

# FLAG PROTECTION CONSTITUTIONAL AMENDMENT

JUNE 2, 2003.—Referred to the House Calendar and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,  
submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.J. Res. 4]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 4) proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States, having considered the same, reports favorably thereon without amendment and recommends that the joint resolution do pass.

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## PURPOSE AND SUMMARY

House Joint Resolution 4 proposes to amend the Constitution of the United States to restore to Congress the authority that it possessed for over 200 years to prohibit the physical desecration of the American flag. The proposed resolution simply states: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” This proposed amendment, by itself, does not effectively prohibit the physical desecration of the flag. Rather, H.J. Res. 4 merely gives Congress authority to legislate in this area and sets boundaries by which Congress can enact legislation, if it so chooses, to prohibit such conduct. For more than two centuries, Congress and the States possessed such power without constitutional objection. It was not until the United States Supreme Court decision in *Texas v. Johnson*<sup>1</sup> in 1989 that the traditional interpretation and understanding of the First Amendment was effectively altered. Prior to the *Johnson* ruling, forty-eight states and the Federal Government had outlawed such conduct consistent with the Bill of Rights. Today, all fifty states have passed resolutions calling on Congress to approve a constitutional amendment to protect the flag and to send it to the states for ratification. This proposed constitutional amendment has also engendered the consistent support of an overwhelming majority of the American public for over a decade.<sup>2</sup> Consistent with the wishes of the American public, H.J. Res. 4 will simply restore that original understanding of the First Amendment which was approved by our Founding Fathers and had been in place since our country’s very existence, allowing Congress to prohibit the physical desecration of the American flag.

## BACKGROUND AND NEED FOR THE LEGISLATION

The flag of the United States of America is the most recognized symbol of freedom and democracy in the world today. Ever since the flag was adopted in a resolution by the Continental Congress on June 14, 1777,<sup>3</sup> the flag has served a unique role as the symbol of our country’s values and the embodiment of the rights guaranteed to all Americans under the Constitution. Indeed, Thomas Jefferson, the author of the Declaration of Independence, and James Madison, commonly referred to as the Father of the Constitution, both supported government actions to prohibit flag desecration and believed such prohibitions to be consistent with the First Amendment.<sup>4</sup> The movement to pass specific legislation prohibiting the desecration of the American flag began in the late 1800’s, with all

<sup>1</sup> 491 U.S. 397 (1989).

<sup>2</sup> See Public Opinion Poll by Market Strategies, Inc. (March 13, 2002) at <http://www.cfa-inc.org/issues/poll2.htm> (finding seventy-five percent (75%) of Americans support such an amendment).

<sup>3</sup> 8 *Journal of the Continental Congress* 1774–1789 at 464 (W. Ford ed. 1907).

<sup>4</sup> Thomas Jefferson, while serving as George Washington’s Secretary of State, instructed American consuls to punish “usurpation of our flag.” *Amicus Curiae* Brief for the Speaker and Leadership Group of the U.S. House of Representatives at 33, *United States v. Eichman*, 496 U.S. 310 (1990) [hereinafter “*Brief*”], citing 9 *Writings of Thomas Jefferson* 49 (mem. ed. 1903). James Madison pronounced a flag defacement in Philadelphia as actionable in Court. As Judge Robert Bork described this historic pronouncement: “The tearing down in Philadelphia in 1802 of the flag of the Spanish Minister ‘with the most aggravating insults,’ was considered actionable in the Pennsylvania courts as a violation of the law of nations.” *Brief* at 34, citing 4 J. Moore, *Digest of International Law* 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

of the states having flag desecration laws on the books by 1932.<sup>5</sup> In 1968, the Federal Government passed its statute prohibiting such conduct.<sup>6</sup> By 1989, every state in the Union except Alaska and Wyoming outlawed such conduct.<sup>7</sup>

Throughout our nation's history, there have been countless acts of such desecration. Since 1994 alone, there have been over 115 reported incidents of flag desecration in 35 states, the District of Columbia, and Puerto Rico.<sup>8</sup> States and the Federal Government, however, have been prevented from proscribing such acts since the United States Supreme Court's ruling in *Texas v. Johnson*<sup>9</sup> in 1989. In *Johnson*, the Supreme Court held in a 5–4 decision that burning an American flag as part of a political demonstration was expressive conduct protected by the First Amendment to the United States Constitution. In that case, Gregory Johnson was convicted of violating a Texas law prohibiting the desecration of a “venerated object” after he publicly burned a stolen American flag in a protest outside of the 1984 Republican National Convention in Dallas, Texas. The Texas law prohibited the intentional desecration of a national flag in a manner in which “the actor knows will seriously offend one or more persons likely to observe or discover his action.”<sup>10</sup> His conviction was upheld by the Court of Appeals for the Fifth District of Texas, but reversed by the Texas Court of Criminal Appeals. The United States Supreme Court subsequently affirmed the holding of the Texas Court of Criminal Appeals, finding that the act of burning an American flag during a protest rally was expressive conduct entitled to protection under the First Amendment.

Chief Justice Rehnquist filed a dissenting opinion in which Justices O'Connor and White joined.<sup>11</sup> Rehnquist noted the unique history of the American flag:

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans

<sup>5</sup>*Desecrating the American Flag: Key Documents of the Controversy From the Civil War to 1995* at xix (Robert Justin Goldstein ed., 1996).

<sup>6</sup>Pub. L. No. 90–381, 82 Stat. 291 (codified as amended at 18 U.S.C. § 700 (2003)).

<sup>7</sup>See *Johnson*, 491 U.S. at 428 n.1 (1989) (C.J., dissenting).

<sup>8</sup>While opponents of H.J. Res. 4 argue that there are few incidents of flag desecration occurring today, they overlook the overarching point. It is not the number of flag desecrations that matter so much as the actual act of flag desecration itself. If there had only been one act of flag desecration in the more than 200 hundred years since our country's founding, and an overwhelming majority of the American public along with every single state legislature called for a remedy to this problem, then it would necessarily fall to Congress to address and rectify this issue pursuant to the wishes of the American citizenry and in accordance with the process set forth in Article V of the Constitution.

<sup>9</sup>491 U.S. 397 (1989).

<sup>10</sup>Tex. Penal Code Ann. § 42.09 (1989), “Desecration of Venerated Object,” provided as follows:

(a) A person commits an offense if he intentionally or knowingly desecrates:  
 (1) a public monument;  
 (2) a place of worship or burial; or  
 (3) a state or national flag.  
 (b) For purposes of this section, “desecrate” means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.  
 (c) An offense under this section is a Class A misdemeanor.

<sup>11</sup>Justice Stevens filed a separate dissenting opinion.

regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.<sup>12</sup>

Rehnquist also found persuasive the opinions of former Chief Justice Earl Warren and former Justices Hugo Black and Abe Fortas, which had noted that the states and the Federal Government had the power to protect the flag from desecration and disgrace.<sup>13</sup>

In response to the *Johnson* decision, Congress approved the “Flag Protection Act of 1989”<sup>14</sup> in September 1989 by a vote of a 371 to 43 in the House and 91–9 in the Senate. The Act amended the Federal flag statute, 18 U.S.C. § 700, in an attempt to make it “content-neutral” so that it would pass constitutional muster. As stated in the House Judiciary Committee report, “the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey.”<sup>15</sup>

On June 11, 1990, in *United States v. Eichman*,<sup>16</sup> the United States Supreme Court, in another 5–4 decision, struck down the recently-enacted “Flag Protection Act of 1989,” ruling that the Act infringed on expressive conduct protected by the First Amendment. Although the Government conceded that flag burning constituted expressive conduct, it claimed that flag burning, like obscenity or “fighting words,” was not fully protected by the First Amendment. The Government also argued the Flag Protection Act was constitutional because, unlike the Texas statute struck down in *Johnson*, the Act was “content-neutral” and simply sought to protect the physical integrity of the flag rather than to suppress disagreeable communication.

Justice Brennan, writing for the majority, rejected the Government’s argument, noting that:

Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted *interest* is “related ‘to the suppression of free expression,’” 491 U.S., at 410, 109 S.Ct., at 2543, and concerned with the content of such expression. . . . [T]he mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise af-

<sup>12</sup> *Johnson*, 491 U.S. at 429 (Rehnquist, C.J., dissenting).

<sup>13</sup> In *Street v. New York*, 394 U.S. 576 (1969), these three legendary Justices set forth their views on the government’s regulation of acts of flag desecration. Former Chief Justice Earl Warren stated, “I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace.” *Id.* at 605 (Warren, C.J., dissenting). In a similar tone, former Justice Hugo Black noted, “It passes my belief that anything in the Federal Constitution bars . . . making the deliberate burning of the American flag an offense.” *Id.* at 610 (Black, J., dissenting). Finally, former Justice Abe Fortas remarked that “the States and the Federal Government have the power to protect the flag from acts of desecration in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations. . . .” *Id.* at 615–617 (Fortas, J., dissenting).

It is also interesting to note that just a few years later, former Justice Byron White reinforced this view in expounding a similar interpretation of the Constitution: “There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag.” *Smith v. Goguen*, 415 U.S. 566, 586 (1974).

<sup>14</sup> Pub. L. No. 101–131, 103 Stat. 777.

<sup>15</sup> “Flag Protection Act of 1989,” H. Rep. No. 101–231, 101st Cong., 1st Sess. 2 (1989). The Act became law without the President’s signature on October 28, 1989.

<sup>16</sup> 496 U.S. 310 (1990).

fect the symbol itself in any way. . . . Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.<sup>17</sup>

Justice Stevens wrote a dissenting opinion in which Chief Justice Rehnquist, Justice White, and Justice O'Connor joined. He expressed agreement with the proposition expressed by the majority that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>18</sup> He went on, however, to note that methods of expression may be prohibited under a number of circumstances and set forth the following standard:

If (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.<sup>19</sup>

Justice Stevens believed that the statute at issue in this case satisfied each of these concerns and thus should have been held constitutional.

As the *Johnson* and *Eichman* decisions illustrate, a statutory remedy is not, and will never be, sufficient to correct the problem of flag desecration. Therefore, the only avenue remaining by which Congress can validly protect the American flag from acts of desecration is through a constitutional amendment. The Framers of the Constitution understood that there would be times in our nation's history necessitating a change in the Constitution and hence provided the people with an amendment process embodied in Article V of the Constitution.<sup>20</sup> While there have been over 11,000 constitutional amendments proposed since the ratification of the Bill of Rights, there have only been 17 amendments actually approved and ratified to be included in the Constitution.<sup>21</sup> Some amendments have been used to correct mistaken Court decisions, as H.J. Res. 4 intends to do, and it is this process that is absolutely vital to maintaining the democratic legitimacy of the Constitution and of judicial review itself.

#### H.J. RES. 4 DOES NOT AMEND OR OTHERWISE UNDERMINE THE FIRST AMENDMENT

Opponents of H.J. Res. 4 argue that the proposed constitutional amendment will amend the Bill of Rights for the first time in our nation's history and significantly undermine rights guaranteed under the First Amendment. H.J. Res. 4, however, will not alter the First Amendment in the slightest. The express language of the

<sup>17</sup>*Id.* at 315–316.

<sup>18</sup>*Id.* at 319 (Stevens, J., dissenting).

<sup>19</sup>*Id.*

<sup>20</sup>See U.S. Const. art. V.

<sup>21</sup>See *Flag Protection Amendment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. (statement of Professor Richard D. Parker, Harvard Law School).

First Amendment does not specifically forbid protection of the flag. Indeed, for over two centuries, the First Amendment was understood to permit flag protection. It was not until the United States Supreme Court in a 5–4 opinion just fourteen years ago that this long-standing interpretation was altered. Conduct has always, and continues to be, regulated by the Government under valid constitutional interpretation. This type of conduct was regulated in the past without prosecutorial abuse or exaggerated implementation, illustrating that the same can occur once again in the future.<sup>22</sup>

H.J. Res. 4 seeks only to correct the Supreme Court’s conclusions in *Johnson* and *Eichman*, which improperly characterized flag desecration as expressive speech when in fact almost any act can be construed as expressive speech. Both state and Federal criminal codes prohibit conduct that could conceivably be cloaked in the First Amendment, yet their constitutionality is unquestioned. For instance, burning a \$10 bill, urinating in public, pushing over a tombstone, or parading through the streets naked are all actions which can be utilized to express a particular political or social message but are unquestionably illegal. These types of conduct are not forms of argument in which the robust exchange of ideas occur and neither does such an exchange occur when one desecrates a flag.<sup>23</sup> Rather, these acts are examples of conduct that our society has chosen not to condone. Flag desecration was once included in that list as a form of conduct our society chose not to condone. However, the Supreme Court’s opinions in *Johnson* and *Eichman* usurped the people’s will in this respect. As illustrated by Article V of the Constitution, however, the Founding Fathers intended that “We the People” should be the final arbiter in deciding what the ultimate law of the land is.<sup>24</sup> The very narrow decision in *Johnson* is all that will be altered by the proposed amendment. H.J. Res. 4 will simply effectuate the will of an overwhelming majority of the American public in a manner pursuant to the mechanisms of Article V of the Constitution by restoring the original meaning to the First Amendment that had persisted for over 200 years and pre-

<sup>22</sup> Some opponents of H.J. Res. 4 claim that unconscionable enforcement will result from ratification of this proposed constitutional amendment by giving the example that actors portraying the burning of the American flag on film or on stage will be prosecuted pursuant to the amendment. Whether this is an actual fear of the opponents of H.J. Res. 4 or just a ploy to build hysteria in opposition to the amendment is irrelevant. What is relevant however, is the fact that just as there were no prosecutions of this type before 1989, there will be no such prosecutions in the future under this proposed amendment. To say that an actor could be prosecuted for such conduct under this constitutional amendment would be like saying an actor who “murders” someone on the big screen could be prosecuted for homicide—an illogical and erroneous conclusion. The issue of implementation will ultimately be debated at great lengths when Congress considers an authorizing statute for this constitutional amendment.

<sup>23</sup> See *Johnson*, 491 U.S. at 430 (C.J., dissenting). If desecrating the flag is speech, although most would argue that it is not, then it would fall into the “certain well-defined and narrowly limited classes of speech” the utterances of which contain “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942).

It should also be mentioned that, on numerous occasions, the Supreme Court has upheld government regulation of pure speech. For example, speech that is likely to incite an immediate, violent response, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); obscenity, *Miller v. California*, 413 U.S. 15 (1973); and libel, *New York v. Sullivan*, 367 U.S. 254 (1970) are not protected under the First Amendment.

<sup>24</sup> As Abraham Lincoln stated in his first inaugural address: “If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers.” Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in *Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101–10, p. 139 (1989).

serving the First Amendment from recent “tampering” by the Supreme Court.

PHYSICAL DESECRATION OF THE FLAG IS CONDUCT WHICH CAN BE  
REGULATED VALIDLY UNDER THE CONSTITUTION

Under United States Supreme Court precedent, certain “expressive” acts are entitled to First Amendment protection, based upon the principle that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.<sup>25</sup> However, “the right of free speech is not absolute at all times and under all circumstances”<sup>26</sup> and not all activity with an expressive component is afforded First Amendment protection. In *United States v. O’Brien*,<sup>27</sup> the United States Supreme Court held that certain modes of expression may be prohibited if: (1) the government regulation is within the constitutional power of the government; (2) the government regulation furthers an important or substantial governmental interest; (3) the government interest is unrelated to suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>28</sup>

In *O’Brien*, the Court upheld a statute prohibiting the destruction of draft cards against a First Amendment challenge. The Court stated that the prohibition served a legitimate purpose—facilitating draft induction in time of national crisis—that was unrelated to the suppression of the speaker’s ideas, since the law prohibited the conduct regardless of the message sought to be conveyed by destruction of the draft card. The prohibition also did not preclude other forms of expression or protest, and the court held that the smooth functioning of the Selective Service System outweighed the need to extend First Amendment protections to the act itself.<sup>29</sup>

H.J. Res. 4 simply seeks to remove the physical flag as a mode of communication, without regard to the content of such speech or the particular viewpoint attempting to be expressed. As Justice Stevens noted in *Eichman*:

It is, moreover, equally clear that the prohibition does not entail any interference with the speaker’s freedom to express his or her ideas by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.<sup>30</sup>

The removal of a mode of communication is consistent with past pronouncements of the Supreme Court, as the Court has noted that “the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all

<sup>25</sup> *Johnson*, 491 U.S. at 414.

<sup>26</sup> *Chaplinsky*, 315 U.S. at 571–572.

<sup>27</sup> 391 U.S. 367 (1968).

<sup>28</sup> *Id.* at 377.

<sup>29</sup> *Id.* at 381.

<sup>30</sup> *Eichman*, 496 U.S. at 322.

places.”<sup>31</sup> Alternative means of expressing ideas are available to political protestors who would have otherwise desecrated a flag in order to express their message. H.J. Res. 4 would deprive an individual of only “one rather inarticulate symbolic form of protest” and leave that person with “a full panoply of other symbols and every conceivable form of verbal expression” to express whatever it is that one desires to express.<sup>32</sup> Such was the status quo in forty-eight states prior to the *Johnson* ruling in 1989. During this long period when flag desecration statutes were valid, wide open debate flourished, as it has throughout America’s history.

THE GOVERNMENT HAS A LEGITIMATE INTEREST IN PREVENTING THE  
PHYSICAL DESECRATION OF THE FLAG

The dissents in *Johnson* and *Eichman* collectively provide an instructive analysis of why Congressional action prohibiting flag desecration is a legitimate interest consistent with the First Amendment. In *Johnson*, the Court rejected Texas’s attempt to prohibit flag desecration because the Court viewed the government’s interest in the treatment of the flag as only arising “when a person’s treatment of the flag communicates some message[,]” thus making it “related ‘to the suppression of free expression.’”<sup>33</sup> The governmental interest in preserving the symbolic value of the Flag, however, is present regardless of the message sought to be conveyed by any particular act of flag desecration. H.J. Res. 4 does not seek to express approval of, nor does it seek to suppress, the content of speech or any particular viewpoint.<sup>34</sup> Justice Stevens’s dissent in *Johnson* extolled the significant and legitimate interest in preserving the flag:

[S]anctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)—be employed.<sup>35</sup>

Former Chief Justice John Marshall Harlan echoed these sentiments over half a century earlier when he stated that “love both of the common country and of the State will diminish in proportion

<sup>31</sup> *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

<sup>32</sup> *Johnson*, 491 U.S. at 432 (Rehnquist, C.J., dissenting).

<sup>33</sup> *Id.* at 410.

<sup>34</sup> Justice Stevens provided the best analogy to this legitimate governmental interest cloaked in content-neutrality in a footnote in *Johnson*:

It seems obvious that a prohibition against the desecration of a gravesite is content neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

*Id.* at 439 n.\* (Stevens, J., dissenting).

<sup>35</sup> *Id.* at 437 (Stevens, J., dissenting).



as respect for the flag is weakened. Therefore a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any disrespect is shown towards it."<sup>36</sup> Just as the Federal Government has a legitimate interest in preserving the quality of an important national asset, such as the Lincoln Memorial, from desecration, so too does the government have just as important an interest in prohibiting the desecration of the American flag.<sup>37</sup>

In *Eichman*, Justice Stevens, joined by Chief Justice Rehnquist, Justice White, and Justice O'Connor, began his dissent by noting the well accepted First Amendment principle that, "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>38</sup> However, Stevens noted that the Federal Government has a legitimate interest in protecting the intrinsic value of the American flag, because the flag, "in times of national crisis, inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance," and, "at all times it serves as a reminder of the paramount importance of pursuing the ideas that characterize our society."<sup>39</sup> Stevens concluded that the societal interest in preserving the symbolic value of the flag outweighs the interest of an individual who believes that desecrating the Flag will be the most effective method of expressing his or her views. Although the value of the individual's choice is "unquestionably a matter of great importance," tolerance of flag burning will "tarnish that value."<sup>40</sup>

#### HEARINGS

The Subcommittee on the Constitution held a hearing on H.J. Res. 4 on May 7, 2003. Testimony was received from four witnesses, Major General Patrick H. Brady (USA-ret.), Chairman of the Board, The Citizens Flag Alliance, Inc.; Lieutenant Antonio J. Scannella, The Port Authority of New York and New Jersey; Mr. Gary E. May, Chairman, Veterans Defending the Bill of Rights; and Professor Richard D. Parker, Harvard Law School. Additional material was submitted for the record by one organization: The Citizens Flag Alliance, Inc.

#### COMMITTEE CONSIDERATION

On May 7, 2003, the Subcommittee on the Constitution met in open session and ordered favorably reported to the full Committee the joint resolution H.J. Res. 4 without amendment by a voice vote, a quorum being present. On May 21, 2003, the Committee met in open session and ordered favorably reported the joint resolution H.J. Res. 4 without amendment by a recorded vote of 18 to 13, a quorum being present.

<sup>36</sup> *Halter v. Nebraska*, 205 U.S. 34, 41–42 (1907).

<sup>37</sup> *Johnson*, 491 U.S. at 438–439 (Stevens, J., dissenting).

<sup>38</sup> *Eichman*, 496 U.S. at 319 (Stevens, J., dissenting).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

## VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.J. Res. 4.

1. An amendment was offered by Mr. Scott to delete the word "desecration" and insert in its place the word "burning." The amendment was defeated by a voice vote.

2. An amendment was offered by Mr. Watt to add the phrase "Not inconsistent with the first article of amendment to this Constitution," changing H.J. Res. 4 to read: "Not inconsistent with the first article of amendment to this Constitution, the Congress shall have the power to prohibit the physical desecration of the flag of the United States." The amendment was defeated by rollcall vote of 12 to 19.

## ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....		X	
Mr. Smith .....		X	
Mr. Gallegly .....		X	
Mr. Goodlatte .....			
Mr. Chabot .....		X	
Mr. Jenkins .....		X	
Mr. Cannon .....		X	
Mr. Bachus .....		X	
Mr. Hostettler .....		X	
Mr. Green .....		X	
Mr. Keller .....		X	
Ms. Hart .....		X	
Mr. Flake .....			
Mr. Pence .....		X	
Mr. Forbes .....		X	
Mr. King .....		X	
Mr. Carter .....		X	
Mr. Feeney .....		X	
Mrs. Blackburn .....		X	
Mr. Conyers .....			
Mr. Berman .....		X	
Mr. Boucher .....			
Mr. Nadler .....	X		
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Meehan .....	X		
Mr. Delahunt .....			
Mr. Wexler .....	X		
Ms. Baldwin .....	X		
Mr. Weiner .....	X		
Mr. Schiff .....	X		
Ms. Sánchez .....	X		
Mr. Sensenbrenner, Chairman .....		X	
Total .....	12	19	

The motion to report H.J. Res. 4 favorably was agreed to by a rollcall vote of 18–13.

## ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....	X		
Mr. Smith .....	X		
Mr. Gallegly .....	X		
Mr. Goodlatte .....			
Mr. Chabot .....	X		
Mr. Jenkins .....	X		
Mr. Cannon .....	X		
Mr. Bachus .....	X		
Mr. Hostettler .....	X		
Mr. Green .....	X		
Mr. Keller .....	X		
Ms. Hart .....	X		
Mr. Flake .....			
Mr. Pence .....	X		
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Carter .....	X		
Mr. Feeney .....	X		
Mrs. Blackburn .....	X		
Mr. Conyers .....		X	
Mr. Berman .....		X	
Mr. Boucher .....			
Mr. Nadler .....		X	
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....		X	
Mr. Meehan .....		X	
Mr. Delahunt .....			
Mr. Wexler .....		X	
Ms. Baldwin .....		X	
Mr. Weiner .....		X	
Mr. Schiff .....			
Ms. Sánchez .....		X	
Mr. Sensenbrenner, Chairman .....	X		
Total .....	18	13	

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J. Res. 4, the following estimate and comparison

prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 27, 2003.*

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 4, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for Federal costs), who can be reached at 226-2860, and Marjorie Miller (for the State and local impact), who can be reached at 225-3220.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

*H.J. Res. 4—Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.*

H.J. Res. 4 would propose an amendment to the Constitution to allow the Congress to enact legislation that would prohibit physical desecration of the U.S. flag. The legislatures of three-fourths of the States would be required to ratify the proposed amendment within 7 years for the amendment to become effective. By itself, this resolution would have no impact on the Federal budget. If the proposed amendment to the Constitution is approved by the states, then any future legislation prohibiting flag desecration could impose additional costs on U.S. law enforcement agencies and the court system to the extent that cases involving desecration of the flag are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant. H.J. Res. 4 would not affect direct spending or revenues.

H.J. Res. 4 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments. In order for the amendment to become part of the Constitution, three-fourths of the State legislatures would have to ratify the resolution within 7 years of its submission to the States by Congress. However, no State would be required to take action on the resolution, either to reject it or approve it.

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs), who can be reached at 226-2860, and Marjorie Miller (for the State and local impact), who can be reached at 225-3220. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

### PERFORMANCE GOALS AND OBJECTIVES

H.J. Res. 4 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable.

### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this resolution in Article V of the Constitution.

### SECTION-BY-SECTION ANALYSIS AND DISCUSSION

H.J. Res. 4 simply states: “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” It further provides for a 7-year ratification period.

Congress clearly possessed this power prior to the decisions of the United States Supreme Court in *Texas v. Johnson*<sup>41</sup> and *U.S. v. Eichman*.<sup>42</sup> Those decisions held that the act of burning a flag during a protest was expressive conduct protected by the First Amendment. As interpreted by the Supreme Court, the First Amendment to the United States Constitution, which states that, “Congress shall make no law . . . abridging freedom of speech,” limits the power of Congress in this respect. H.J. Res. 4 makes clear that Congress does have the power to pass legislation to prohibit the physical desecration of the flag of the United States.

This proposed constitutional amendment sets the parameters for future action by the Congress on this issue. After the amendment is ratified, the elected representatives of the people will once again have the power to decide whether to enact legislation to prohibit the physical desecration of the flag.

There are two key issues Congress will need to consider in enacting legislation to protect the flag from physical desecration. First, Congress must consider the meaning of “physical desecration.” The amendment itself requires physical contact with the flag. Under this amendment, Congress could not punish mere words or gestures directed at the flag, regardless of how offensive they were. Webster’s Ninth New Collegiate Dictionary defines “desecrate” as follows: “1: to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others.” “Desecrate” is defined in Black’s Law Dictionary as “to violate sanctity of, to profane, or to put to unworthy use.” Congress could clearly prohibit burning, shredding, and similar defilement of the flag.

In any event, the word “desecration” was selected because of its broad nature in encompassing many actions against the flag. Such broad terms are commonly used in constitutional amendments; for example, “free exercise” in the First Amendment; “unreasonable searches and seizures” and “probable cause” in the Fourth Amendment; “due process” and “equal protection” in the Fourteenth Amendment. The use of broad terms in constitutional amendments, such as the word “desecration,” must continue in order to give Congress discretion when it moves to enact implementing legislation.

<sup>41</sup> 491 U.S. 397 (1989).

<sup>42</sup> 496 U.S. 310 (1990).

Debate and discussion as to what forms of desecration should be outlawed, such as burning, will come at a later date in Congress. Otherwise, Congress would be restricted and unduly limited in achieving its objective and purpose in approving a constitutional amendment such as H.J. Res. 4.

Second, Congress will have to decide what representations of the flag of the United States are to be protected. Of course, the resolution in no way changes the fact that “what constitutes the flag of the United States” is defined by the United States Congress at 4 U.S.C. § 1. In enacting a statute, Congress will need to decide which representations of the flag are to be protected from physical desecration. The flag of the United States may be defined in this future authorizing statute as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official flag of the United States as described in 4 U.S.C. § 1. A “flag” could also be defined as anything that a reasonable person would perceive to be a flag of the United States even if it were not precisely identical to the flag as defined by statute. This would allow the Congress to prevent a situation whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes was burned in order to circumvent the statutory prohibition. However the future permutations of these words may develop, that is for a future Congress to address.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes H.J. Res. 4 makes no changes in existing law.

#### MARKUP TRANSCRIPT

### **BUSINESS MEETING**

**WEDNESDAY, MAY 21, 2003**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:01 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is House Joint Resolution 4, proposing an amendment to the Constitution of the United States, authorizing the Congress to prohibit the physical desecration of the flag of the United States.

The Chair recognizes the gentleman from Ohio, Mr. Chabot, the Chairman of the Subcommittee on the Constitution for a motion.

Mr. CHABOT. Thank you, Mr. Chairman. The Subcommittee on the Constitution reports favorably the resolution H.J. Res. 4 and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, H.J. Res. 4 will be considered as read and open for amendment at any point.

[The resolution, H.J. Res. 4, follows:]

108TH CONGRESS  
1ST SESSION

## H. J. RES. 4

Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

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### IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 2003

Mr. CUNNINGHAM (for himself, Mr. MURTHA, Mr. KENNEDY of Minnesota, Mr. MCINTYRE, Mr. WAMP, Mr. KING of New York, Mr. ROTHMAN, Mr. FOLEY, Mrs. JOHNSON of Connecticut, Mr. ISSA, Mr. SHIMKUS, Mr. STRICKLAND, Mr. KANJORSKI, Mrs. CUBIN, Mr. BRADY of Texas, Mr. PETERSON of Minnesota, Mr. GREEN of Texas, Mrs. JO ANN DAVIS of Virginia, Mr. SWEENEY, Mr. CRAMER, Mr. TOOMEY, Mrs. WILSON of New Mexico, Mr. BILIRAKIS, Mr. SHERWOOD, Mr. BUYER, and Mr. NEY) introduced the following joint resolution; which was referred to the Committee on the Judiciary

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## JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

1        *Resolved by the Senate and House of Representatives*  
2        *of the United States of America in Congress assembled (two-*  
3        *thirds of each House concurring therein),*

#### 4        **SECTION 1. CONSTITUTIONAL AMENDMENT.**

5        The following article is proposed as an amendment  
6        to the Constitution of the United States, which shall be

★

1 valid to all intents and purposes as part of the Constitu-  
2 tion when ratified by the legislatures of three-fourths of  
3 the several States within seven years after the date of its  
4 submission for ratification:

5 “ARTICLE —

6 “The Congress shall have power to prohibit the phys-  
7 ical desecration of the flag of the United States.”.

○



Chairman SENSENBRENNER. The Chair recognizes the gentleman from Ohio to strike the last word.

Mr. CHABOT. Move to strike the last word. Thank you, Mr. Chairman.

This morning we consider for purposes of markup, House Joint Resolution 4, a proposed constitutional amendment to restore authority to Congress to prohibit the physical desecration of the American flag. The Subcommittee on the Constitution, which I chair, held a hearing on the proposed amendment on May 7, 2003, with witnesses testifying as to the necessity for such authority, and that a proposed constitutional amendment is the only means through which Congress may restore this protection to our national symbol. This is an important proposal, but some will say otherwise.

The flag is the most recognized symbol of freedom and democracy in the world today, and the embodiment of the ideals upon which America was founded. It is a national asset that helps to preserve our unity, our freedom and our liberty as Americans.

As our country has grown and welcomed those from diverse religious and cultural backgrounds, the flag's power to unify our Nation has become even more evident, bringing together all Americans, young and old, to champion those principles upon which this country was built. Vigilant protection of freedom of speech, in particular, political speech, is central to our political system. Contrary to what some have argued, the Flag Protection Amendment will not abridge long-held guarantees of free speech embodied in the First Amendment or otherwise limit the freedoms guaranteed under the Bill of Rights. Rather, H.J. Res. 4 will simply restore the traditional interpretation of the First Amendment that had prevailed in this country since its founding, that flag burning is conduct that can be validly prohibited under the Constitution.

Until the United States Supreme Court's decision in *Johnson* in 1989, the regulation of such conduct had been viewed as compatible with both the letter and the spirit of the First Amendment. Even the framers of the Constitution supported this conclusion, as both Thomas Jefferson and James Madison strongly favored Government action to prohibit flag desecration. The approval and ultimate ratification of H.J. Res. 4 will restore this traditional interpretation of the First Amendment. As we all know, the First Amendment does not grant an individual an unlimited right to engage in any form of desired conduct under the cloak of free expression. Both State and Federal criminal codes are full of examples of conduct that is prohibited in our country, regardless of whether it is cloaked in the First Amendment. Obscenity laws, libel and slander laws, copyright laws, and even perjury laws, all reflect the fact that some forms of expression and sometimes even the content of that expression may be regulated or even prohibited without violating the First Amendment. The Flag Protection Amendment is consistent with the First Amendment, while reflecting society's interest in maintaining the flag as a national symbol by protecting it from acts of physical desecration.

I would ask my colleagues to join me in restoring the original interpretation to the First Amendment that had persisted for over 200 years, and with that, the protection to the American flag. This amendment is now more important than ever and is necessary in order to preserve our values for future generations. With this in

mind I encourage the Members of this Committee to pass this proposed amendment in Committee today.

I yield back the balance of my time.

[Intervening business.]

Chairman SENSENBRENNER. Who wishes to make the minority opening statement on the flag amendment? Gentleman from Virginia.

Mr. SCOTT. Mr. Chairman, I have an amendment. I can make my statement with the amendment.

Chairman SENSENBRENNER. Without objection, all opening statements will be placed in the record at this point in time.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. Today we endure the annual Republican Rite of Spring: a proposed amendment to the Bill of Rights to restrict what it calls flag "desecration."

Why spring? Because, the calendar tells us that Memorial Day will soon be upon us, June 14, is Flag Day, and then we have July 4th. Members need to send out a press release extolling the need to "protect" the flag as if the flag somehow needed Congress to protect it. The flag is a symbol of a great nation and the fundamental freedoms that have made this nation great. If the flag needs protection at all, it is from members of Congress who value the symbol more than the freedoms the flag represents. Quite frankly the crass political use of the flag to question the patriotism of those who value our fundamental freedoms is a greater insult to those who died in the service of our nation than the burning of the flag. It is the civic equivalent of carrying the L-rd's name in vain.

People have rights in this country that supercede public opinion, even strongly held public opinion. If we do not preserve those rights, then the flag will have been desecrated far beyond the capability of any individual with a cigarette lighter.

Let there be no doubt that this amendment is aimed directly at ideas. Current federal law says that the preferred way to dispose of a tattered flag is to burn it, but there are those who would criminalize the same act if it was done to express political dissent. Current federal law, which is constitutionally void, also makes it a misdemeanor to use the flag for advertising or on packaging. How many members of Congress, used car dealers, fast food restaurants, and other seemingly legitimate individuals and enterprises have engaged in this act which our laws define as flag desecration? This amendment would presumably make that law constitutional once more. If ratified, I think there are more than a few people who will have to redesign their campaign materials to stay out of the pokey.

At the Subcommittee hearing, I was proud to welcome as a witness an officer of the Port Authority Police. No New Yorker who lived through that day, the days after, and the memorials we all attended, could ever forget their service and how moving it was to see that flag.

I am, however, getting a bit tired of that act of barbarism being used to justify a plethora of political causes. As the President has often remarked, the people who murdered 3,000 of my neighbors did so because they hated our free society. Yet to use that atrocity to justify a curtailment of our freedoms strikes me as a desecration of their memory. Similarly, many people who marched against the war objected to the political use of their loved ones deaths to justify the war. For example, Rita Lasar, became angry when the attacks were used to justify the war. Her brother, Abe Zelmanowitz, died in the north tower, refusing to leave his quadriplegic co-worker. Adele Welty of Flushing, whose son, Timothy Welty, was a member of Rescue Squad 288 and who died in the Trade Center said, "He would not have wanted innocent people killed in his name." She was later arrested for her dissent against the war.

So people who claim to speak for the dead of September 11, should show a bit of modesty. I represent that community in Congress, and I can tell you they do not all hold the same views on this issue. In fact, there is probably more opposition to this proposed amendment in my district than in almost anywhere else in the country.

People have died for the nation and the rights which this flag so proudly represents. Let us not destroy the way of life for which they made the ultimate sacrifice.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF TEXAS

Thank you, Mr. Chairman. I oppose H.J. Res. 4, an amendment to the Constitution to prohibit physical desecration of the flag of the United States. I oppose H.J. Res. 4 because this resolution is an overly broad infringement on the First Amendment Right to Freedom of Speech.

This is not the first time the Judiciary Committee has considered this very Amendment to the Constitution. In 1990, Congress considered and rejected H.J. Res. 350—an Amendment to the U.S. Constitution specifying that “The Congress and the States have the power to prohibit the physical desecration of the flag of the United States.” This failed to get the necessary two-thirds congressional majority by a vote of 254–177 in the House and 58–43 in the Senate. Again in 1995 Congress considered the same amendment, H.J. Res. 79, but did not get the necessary two third majority vote of the Senate. In 1999, this Constitutional Amendment, then call H.J. Res. 33, also failed to be passed.

I renew my opposition to this Constitutional Amendment. Despite my opposition, I agree with the proponents of this Constitutional Amendment that the American flag is a symbol of all of the principles and ideals that this country is built upon—freedom of assembly, freedom of religion, equality, and justice to name a few.

One of the most important ideals that the flag symbolizes is the First Amendment protection of freedom of speech. I believe that freedom of speech should be protected without condition. The Supreme Court of the United States, as it relates to desecration of the flag, appears to agree.

In 1989 the Supreme Court addressed the issue of flag desecration as it related to the First Amendment. In *Texas v. Johnson*, 491 U.S. 397, the Supreme Court upheld the finding of Texas Court of Criminal Appeals that a Texas law that criminalized flag desecration or mistreatment in a way that the, “actor knows will seriously offend one or more persons” was unconstitutionally applied. In a 5–4 decision written by Justice Brennan, the court first found that burning the flag in political protest was a form of expressive conduct and symbolic speech subject to First Amendment protection.

While the Court acknowledge that Texas had a legitimate interest in preserving the flag as a “symbol of national unity,” this interest was not sufficiently compelling to justify a “content based” legal restriction on freedom of speech. The potential First Amendment and freedom of speech implications of this resolution is most frightening. If passed, this would be the first time in our nation’s history that we have altered the Bill of Rights to drastically limit one of the prized freedoms we hold dear. This would be a dangerous precedent to set, thus opening the door to the erosion of our other protected fundamental freedoms.

H.J. Res. 4 is particularly dangerous to freedom of speech because as written the proposed Constitutional amendment is overly broad and vague. It states that, “Congress shall have power to prohibit the physical desecration of the flag of the United States.” What does the term desecration actually mean? Is it the burning of the flag? Flag burning is the preferred means of disposing of the flag when it is old.

The Court noted in *Texas v. Johnson*, that according to Congress it is proper to burn the flag, “When [the flag] is in such a condition that it is no longer a fitting emblem for display.” What criteria will be used to determine when the flag is no longer fit for display and can thus be burned without penalty?

It is rare that a flag is ever burned in our country as a form of political speech or otherwise. For example, from 1777 through 1989, only 45 incidents of flag burning were reported. Since the Supreme Court’s decision in 1989, fewer than ten (10) flag burning incidents have been reported per year.

The flag is a symbol of our freedoms. The right to speak openly, even if that speech is unpopular, is a freedom. As we consider this Amendment we are faced with a difficult question: Do we protect a symbol of freedom of speech, or do we protect free speech itself? When given the choice, I choose to protect freedom itself over a symbol of freedom.

Mr. Chairman, for these reason, I urge my colleagues to vote no on H.J. Res. 4.

Chairman SENSENBRENNER. Are there any amendments? The gentleman from Virginia.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 4 offered by Mr. Scott. Page 2, line 7, delete “desecration” and insert “burning.”  
[Mr. Scott’s amendment follows:]

AMENDMENT #1  
TO H.J. RES. 4  
OFFERED BY MR. SCOTT

Page 2, line 7, delete “desecration” and insert “burning”.

Chairman SENSENBRENNER. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this amendment would prohibit, would change the constitutional amendment to prohibit flag burning. The Supreme Court has considered the restrictions in the Bill of Rights are permissible by Government. For example, under the First Amendment with respect to speech, time, place and manner may generally be regulated, while content cannot. So you can restrict the particulars of a march, what time it’s held, where it’s held, but you can’t restrict what people are marching about. You can’t ban a particular march because you disagree with the message unless you deal with all marches. You can’t have marches by the Republican Party but not by the Democratic Party.

We should acknowledge that the purpose of the underlying amendment is to stifle political expression we find offensive. While I agree that we should all respect the flag, I don’t think it’s appropriate to use the criminal code to enforce our views on those who disagree with us.

Some refer to the underlying resolution as the anti-flag burning amendment, and they speak about the necessity of this amendment to keep people from burning flags, but really, the only place that we ever see flags burn is in compliance with the Federal Code at flag ceremonies, disposing the flag, a worn out flag, the appropriate way to dispose of it is in fact to burn it.

The amendment, underlying amendment without my amendment, is about expression and about prohibiting expression in violation of the spirit of the First Amendment. By using the word “desecration” we’re giving Government officials the power to decide that one can burn a flag if he is saying something nice or respectful, but he is a criminal if he burns a flag while saying something insulting or offensive. This is absurd and in direct contravention of the whole purpose of the First Amendment.

So to make this amendment consistent with the ideals of the First Amendment’s provision involving freedom of expression, I am proposing that we just burn—we just ban all flag burning. My amendment has no content based restrictions. It makes the underlying amendment content neutral. All flag burning would be outlawed. The underlying resolution permits flag burning while you’re burning the flag, but would criminalize flag burning if you’re saying something bad. But if we really intend to bar flag burning, then

let's bar all flag burning consistent with the ideals of the First Amendment.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. I recognize myself in opposition to the amendment.

This amendment is too narrowly drafted, and I can state that it's too narrowly drafted from a decision that the Wisconsin Supreme Court made following the precedent in the *Johnson* case. There they reversed the conviction of a person who admitted to defecating on the United States flag to make a political statement, and they held that this disgusting act was free speech, that it was protected by the First Amendment. I guess doing that on the flag is free speech and doing the same thing on the editorial page of the New York Times or the Washington Post is disorderly conduct. But what this amendment does is that it would allow these types of acts that continue to be constitutionally protected under the *Johnson* decision, and that is reason alone, since there is a State Supreme Court decision in at last one State, to reject the Scott amendment, and I would urge a no vote. Yield back the balance of my time.

Mr. CHABOT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I agree with the Chairman's point and would like to make the further point that I also believe it should be rejected because the word "burning" would unduly limit the protection of the flag that this amendment is seeking to establish. The word "desecration" was selected because of its broad nature in encompassing many actions against the flag. Such broad terms are commonly used in constitutional amendments. For example, "free exercise" in the First Amendment, "unreasonable search and seizures" and "probable cause" in the Fourth Amendment, "due process" and "equal protection" in the Fourteenth Amendment. Thus, it is essential that we continue to use broad terms in constitutional amendments such as the word "desecration," in order to give Congress discretion when it moves to an act implementing legislation. A debate and discussion as to what forms of desecration should be outlawed, such as "burning" will come at a later date in Congress. Therefore, this amendment should be rejected as unduly limiting the object and purpose of the Flag Protection Amendment, which is to protect the flag from any acts of physical defilement or defacement, or as is described in this, desecration.

I yield back the balance of my time.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank the Chairman. I think the comments of the Chairman and my good friend, Mr. Chabot, the Chairman of the

Subcommittee, illustrate precisely why this amendment is necessary, and the statements of Mr. Scott from Virginia illustrate precisely why this amendment is necessary. If this is about banning conduct for speech expression, then the Court is going to hold this unconstitutional anyway, or whatever the Congress could pass in furtherance of this constitutional amendment would be held unconstitutional. If it's really about burning the flag as opposed to controlling what somebody is saying or thinking or expressing as they burn the flag, then Mr. Scott's amendment would be broad enough to serve that purpose.

So I don't think anything either the Chairman of the Subcommittee or the Chairman of the full Committee said carries—expresses a real reason if we want this to be constitutional for voting against the amendment, and I would encourage my colleagues, if they would rather have a constitutional bill to support the amendment, if they would rather have a sound bite and be able to beat on their chests and tell people how patriotic they are, then vote against it and vote for the underlying bill.

I yield to Mr. Scott.

Mr. SCOTT. Thank you. I thank the gentleman for yielding.

Mr. Chairman, I think it should not go without some comment when you talk about things that would be crimes, that would apparently somehow get some kind of protection if you're doing it with the flag. I mean if you steal somebody's flag and burn it, you are not protected from the criminal code involving theft and destruction of somebody else's property merely because it was a flag that you stole. I'm not sure exactly what the fact situation was, Mr. Chairman, on that defecating case, but I suspect that wherever you did it, if it were a crime to do it on the New York Times, I'm sure it would still be a crime to do it just because you had a flag somewhere around.

I suppose, using that same logic, if you used a flag to beat somebody over the head and murder them, that you would not be protected from the murder statutes because you used a flag. These are crimes regardless of whether a flag is used or not.

What this amendment will do is take the content out of it. It says that if you burn the flag, that would be a crime, not if you burn the flag and say something insulting to the sheriff, that would be a crime, but if you say something nice about the sheriff, it would not be a crime. That is an absurd distinction contrary to the ideals of the First Amendment provisions involving freedom of expression, and I would hope that we would be consistent with those ideals by taking the content out of the equation and making the act criminal if that's what we want to do, and not make the expression criminal. I yield back.

Mr. WATT. I yield back, Mr. Chairman.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I speak in support of this amendment. Mr. Chairman, if the flag needs protection at all, it is from Members of Congress who value the symbol more than the freedom the flag represents. Quite frankly, the crass political use of the flag to question the patriotism of those who value our fundamental freedoms is a far greater insult to those that died in

the service of our Nation, than is the burning of the flag. It is the civic equivalent of taking the Lord's name in vain.

People have rights in this country that supersede public opinion, even strongly held public opinion. If we do not preserve those rights, then the flag will have been desecrated far beyond the capability of any individual with a cigarette lighter.

Let there be no doubt that this amendment is directly aimed at ideas. Current Federal law says that the preferred way to dispose of a tattered flag is to burn it, and that's fine. So it's fine to burn a flag if you stand there saying wonderful things about the flag and respectful things about the Administration, but if you burn the flag by saying the war in Iraq was terrible or we disagree with the Administration or the President is not a nice guy, that's a crime. And what is being made criminal is not actually the burning of the flag, but the desecration of the flag. Defining the desecration as burning it, a neutral act, which is praiseworthy under some circumstances, but it made criminal if associated with unpopular ideas. That's why the Supreme Court declared that these statutes were unconstitutional and that's why we should not amend the Constitution.

Secondly, I'll give you another example. If someone produced a film, a movie, in which actors played Nazi soldiers, and as part of their portrayal of Nazi soldiers trampled upon the flag, I doubt that anyone would suggest that the police ought to march in and arrest the actors and the producers and the director of the film because no one thinks they mean the terrible things they are saying as actors in the film. But if they meant it, then they should be arrested for flag desecration. That's what this amendment is all about, directly criminalizing an act that otherwise is okay when associated with ideas we don't like, the essence of free speech.

At the Subcommittee hearing, Mr. Chairman, I was proud to welcome as a witness an officer of the Port Authority Police. No New Yorker who lived through that day, the days after and the memorials we all attended, could never forget their service and how moving it was to see that flag. I am however getting very tired of that act of barbarism being used to justify a plethora of political causes. As the President has often remarked: The people who murdered 3,000 of my neighbors did so because they hated our free society. Yet to use that atrocity to justify a curtailment of our freedoms, as has been done in this debate, not today but on many occasions, strike me as a desecration of the memory of the people who died. Similarly, many people who marched against the war objected to the political use of their loved ones' deaths to justify the war. For example, Rita Lasar became angry when the attacks were used to justify the war. Her brother, Abe Zelmanowitz, died in the North Tower, refusing to leave his quadriplegic coworker. Adele Welty of Flushing, whose son, Timothy Welty, was a member of Rescue Squad 288 and died in the Trade Center, said: "He would not have wanted innocent people killed in his name." She was later arrested for her dissent against the war.

So people who claim to speak for the dead of September 11th or for our other honored dead should show a bit more modesty. I represent that community in Congress, and I can tell you they do not all hold the same views on this issue. In fact, there's probably more opposition to this proposed amendment in my district than almost anywhere else in the country. People have indeed died for the Na-

tion and for the rights which this flag so proudly represents. We should not destroy the way of life and desecrate their memory by passing this amendment which would desecrate freedom.

I would also point out that some of our foremost patriots who support this amendment, such as those sitting in the first row, are violating the law. Specifically look at that tie with the American flag on it. Section 8 of title IV of the United States Code says: The flag should never be used as a wearing apparel, bedding or drapery, et cetera, et cetera. No one is suggesting that this gentleman ought to be arrested, because if he were doing that and if he tore off his tie while criticizing the Administration or criticizing some policy, then under the amendment we're considering, he could be arrested. But sitting there supporting this amendment, wearing that tie that according to the statute desecrates the flag, he's doing nothing wrong, and I support his right to wear that tie, and if he considers it good, so be it. That's freedom. We should not strip him of this freedom which this amendment essentially would do.

I yield back and I thank you, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye.

Opposed no.

The noes appear to have it. The noes have it, and the amendment is not agreed to. Are there further amendments?

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 4 offered by Mr. Watt.

Mr. WATT. I ask unanimous consent the amendment be considered as read.

The CLERK. On page 2—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman is recognized for 5 minutes.

[Mr. Watt's amendment follows:]

#### AMENDMENT TO H. J. RES. 4

OFFERED BY MR. WATT

On Page 2, line 6, strike "The" and insert "Not inconsistent with the first article of amendment to this Constitution, the".

Mr. WATT. Thank you, Mr. Chairman. I feel like this is kind of *deja vu* all over again because this is the same amendment that we have debated previously in the consideration of this bill, and it is consistent with Mr. Scott's and my effort to try to make what we are doing here fit within the confines of the existing Constitution.

Mr. Chabot and those who support this amendment, go out of their way to say that they're not trying to do anything that violates the Constitution, that they are not trying to do anything that vio-



lates the First Amendment. Yet, if we are ever put to the test of having this proposed constitutional amendment and the First Amendment to the Constitution, I don't want there to be any doubt that the First Amendment is going to take precedence. It has been in the Constitution for years and years and years. We don't have any idea of what the Supreme Court might do with this proposed constitutional amendment. We don't have any idea what the Congress might do in furtherance of this proposed amendment. But we do know that the First Amendment to our Constitution has served our country well for years and years and years. And so this amendment would simply say that this proposed constitutional amendment that we are offering here must be construed to be consistent with the First Amendment to the Constitution, and if in fact it is flag desecration as opposed to the content of somebody's speech or action that we are trying to outlaw, then this should really not cause anybody any problem. So I would encourage my colleagues to support this amendment and I yield back the balance of my time.

Chairman SENSENBRENNER. Gentleman from Ohio, Mr. Chabot.  
Mr. CHABOT. Thank you. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. This amendment should also be rejected because the Supreme Court would declare as unconstitutional, per se, any legislation enacted under this constitutionally proposed language that effectively prohibits the physical desecration of the flag as such legislation would be inconsistent with the First Amendment pursuant to the *Johnson* case and the *Eichman* case, through its use of limiting language and as a result of its position as the first phrase in the amendment, courts would construe Mr. Watt's amendment as controlling all other aspects of the constitutional amendment itself. Thus, Mr. Watt's amendment would require the Court to apply the reasoning and the holding of the *Johnson* and *Eichman* cases, which were decided based upon the first article of the amendment of the Constitution, thus ensuring that all legislation enacted pursuant to the amendment version of H.J. Res. 4 would be struck down as unconstitutional in violation of the First Amendment.

So if this amendment were passed, in essence, any legislation that we would pass subsequent to this would be struck down. Just in response to a couple other things that my good friends on the other side mentioned, is the argument that an actor portraying the burning of a flag on stage in a play or in a movie or something like that could be arrested is like saying that we could arrest actors for homicide when they are portraying a murder on screen. It just does not happen, and it would not happen.

Mr. NADLER. Will the gentleman yield for a question?

Mr. CHABOT. Let me finish, and then I would be happy to yield. There are other, I think, examples. The arguments that are made that we wouldn't be able to differentiate between a veteran's—which many of us have attended on Memorial Day for example—when a flag is burned in a respectful manner for a particular purpose by statute, that we wouldn't be able to differentiate between somebody desecrating the flag by burning or defecating on it, as the Chairman's example was, just ultimately says that the Amer-

ican people, that the courts, the prosecutors, had no common sense, that there's no common sense in the law. You know, we can differentiate between many different things that take place. When a doctor operates on a person and puts a scalpel in somebody, he's not going to be prosecuted for doing that, but if somebody takes a knife and puts it in another human being, he's going to be prosecuted. There's common sense in the law. There are courts that ultimately protect the people and prosecutors hopefully also have common sense, and if they don't there are defense lawyers who will take their cases. I mean it happens all the time in this country. When you take a person to the grocery store and a movie, that's very different than somebody who, against their will, kidnaps a person, but in essence you're conveying the person to another location, and the difference is whether it's with their consent or not. There are many different things which are similar, which are used—and we've gone through this, as the gentlemen have also mentioned, a number of times prior to this. Hopefully this time I hope that we get it passed into the Constitution and protect the flag, as it was protected and had been for over 200 years, as has been stated. This has only been the case since 1989, 1990. Prior to that, as I mentioned before, Thomas Jefferson, James Madison, all these folks took it for granted that the flag was going to be protected. It's only recently, you know. And we look like because it's been this for a decade or so now, we sort of think, well, this is what we have to put up with. We don't have to put up with it. And that's why these veterans are here, and that's why veterans groups in particular feel so strongly about this, because those are the men and women who put their lives on the line for us, and these arguments that I hear again, and they're very craftily made and in a very articulate manner, but they just don't hold water if one really examines them, and I'll yield the balance of my time.

Mr. NADLER. Thank you. I think you misunderstood the argument. I was not worried about the——

Chairman SENSENBRENNER. The time belongs to the gentleman from Ohio.

Mr. NADLER. He yielded to me.

Mr. CHABOT. I did yield.

Mr. NADLER. I did not argue that we would be in danger of arresting the actors or that it would be hard to figure out how not to do that. My argument was that we would not think of arresting the actors because they obviously didn't mean the terrible things that they were saying as they trampled the flag. If they meant the terrible things they were saying, then we would arrest them and that's the point of this amendment.

Ms. LOFGREN. Mr. Chairman

Mr. CHABOT. Reclaiming my time. Can we make this the differentiation—it takes common sense. One has to assume that there's some common sense in the law and there are protections in the law. That's why we have courts who can ultimately make a determination.

Chairman SENSENBRENNER. The gentleman's time has expired. For what purpose does the gentlewoman from California, Ms. Lofgren, seek recognition?

Ms. LOFGREN. Strike the last word.

Chairman SENSENBRENNER. Gentlewoman's recognized for 5 minutes.

Ms. LOFGREN. Mr. Chairman, I realize that on this subject passions can be very high, but it seems to me that when our brave Americans go off to fight in a war, they look to the flag as a symbol of the country, but the symbol isn't the same as the essence, and I'd like to reference just one brave veteran and that is my father-in-law, who fought in the South Pacific in World War II. He made captain in the field. It was so horrible that he really doesn't like to discuss the details of it, and his generation has been called the greatest generation. They saved the world for freedom from the Nazis and other forces, and he has urged me to support the First Amendment and not to support this constitutional amendment, because he felt that when he was over there in World War II, he was fighting for the First Amendment, for freedom, and I think that we ought to take that advice to heart. I think the amendment offered by the gentleman from North Carolina really is a compromise that really does everything for all of us, and I would like to yield to the gentleman to further discuss this amendment.

Mr. WATT. I thank the gentlelady for yielding. I just want to take the opportunity to respond to a couple things that Mr. Chabot said. If you look at the proposed amendment that is—that's the underlying bill, it says that the constitutional amendment will be, quote, "The Congress shall have power to prohibit the physical desecration of the flag of the United States."

It seems to me that whatever Congress does in furtherance of this language is going to have to be very well thought out and well crafted and is going to have to be subject to the First Amendment anyway. I don't see how Congress could pass a statute prohibiting the desecration of the flag, the burning of the flag, doing anything with the flag that could be inconsistent with the First Amendment and have that legislative act that Congress takes be held constitutional.

Now, what you would like to do is pass this amendment and tell people that you have done something. You haven't done a thing but empower the Congress to pass a statute that has to be consistent with the First Amendment, and this notion that you are somehow getting around these decisions that the Supreme Court has entered, related to the Constitution by passing this, is just folly. So all my amendment does really is reaffirm exactly what the law is going to be regardless of whether you pass my amendment or not. And all I'm doing really is sending up a red flare over Congress that says whatever you do, whatever statute we pass in furtherance of this constitutional amendment, you better be darn sure that it is carefully done, and done in a way that is consistent with the First Amendment, and that's all this proposed amendment to the amendment would do. And I can't imagine why anybody would have problems with that.

You're going to be stuck with the First Amendment anyway. I know there are a lot of people here who hate to hear that, but you're going to be stuck with the First Amendment. It is not going away. So let's just reaffirm our commitment to the First Amendment, give Congress the right to ban desecration, if we can figure out a way to do it that's not inconsistent with the First Amend-

ment, and at some point come back here and let Congress try to face up to that challenge. I yield back.

Mr. HOSTETTLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman's time has expired. The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I rise in opposition to the amendment, and just stating that the amendment is not necessary. As Andrew Jackson stated in his veto message of the reauthorization of the national bank, that the President, the Executive, is not compelled to construe the Constitution in the same manner as the Court is; neither is the Legislative Branch compelled to do likewise. There is nothing sacred in the Constitution that grants the Federal courts any greater ability to construe the Constitution, especially with regard to amending the Constitution, as the legislature, and in fact, we in this body, are fully capable of construing the meaning of the First Amendment according to what we believe the Constitution and the First Amendment specifically means. That's what we are doing here today.

And so what the gentleman seeks to do is I think, as the Chairman of the Subcommittee noted, is just to boot this obligation to construe the Constitution and the First Amendment back to the Supreme Court. I don't want to do that. I don't think the Supreme Court makes good decisions in these areas. I think they made several bad decisions in the past and—

Mr. WATT. Would the gentleman yield?

Mr. HOSTETTLER. Just one moment. I'll yield in just a moment.

Likewise, the gentleman from North Carolina suggests that if we legislate according to the authority given in this amendment with regard to the meaning of "desecration" that the Court will go back to the previous amendment and strike down the statute which we have passed and has been ultimately enacted as a result of the Court's believing there is a difference or is an inconsistency with regard to the First Amendment. If that logic would hold, then the Court would have struck down virtually every civil rights act that had been put in place as a result of the Fourteenth Amendment, and the legislative clause in section 5 of the Fourteenth Amendment due to the Tenth Amendment to the Constitution. That's not going to happen. Just as the Fourteenth Amendment gave the Federal legislature the authority in section 5 to legislate on issues regarding the States and rights of citizens of States, this amendment will give the Congress the authority to legislate with regard to desecration of the flag. I would hope that the Court would not be as inconsistent with this new amendment, it would not be as inconsistent with this new amendment just as it has not been inconsistent with the application of the Fourteenth Amendment and Congress's utilization of section 5 of the Fourteenth Amendment to grant civil rights to American citizens.

I'd be happy to yield to the gentleman from North Carolina.

Mr. WATT. I thank the gentleman for yielding. I'm not going to get into a debate about the Fourteenth Amendment. This is about the First Amendment, and I honor all of the amendments to the Constitution. But let me just walk the gentleman through this.

This proposed bill that we are dealing with says that Congress shall have power to prohibit the physical desecration of the flag of the United States. Does the gentlemen believe that this amendment would itself prohibit anything without Congress acting?

Mr. HOSTETTLER. Reclaiming my times, just as the framers of the Fourteenth Amendment believe that they had to add the section 5 of the Fourteenth Amendment to it, this will grant Congress the authority to legislate in this area.

Mr. WATT. So the gentleman agrees that this doesn't prohibit the physical desecration that the Congress must do something pursuant to this for it to be prohibited; is that right?

Mr. HOSTETTLER. Just as subsequent civil rights act, after the Fourteenth Amendment were passed—

Mr. WATT. I just want to—

Mr. CHABOT. Will the gentleman yield?

Mr. WATT.—establish that point. Now, the next question I have—

Mr. HOSTETTLER. Reclaiming my time, I'll yield to the gentleman.

Mr. CHABOT. I will be quick because your time's ready to run out. Nobody is making the allegation that this amendment itself takes care of the problem. What it does is it gives Congress the power to prohibit the physical desecration of the flag.

Mr. WATT. Would the gentleman yield?

Mr. CHABOT. That's what this does and nobody's arguing to the contrary.

Mr. WATT. Would the gentleman yield?

Mr. CHABOT. We could have done that, but we didn't. And so a subsequent Congress or perhaps this Congress, could then pass a law that it could craft to make sure that the First Amendment and every other amendment is taken care of. So clearly the Court will interpret this amendment in light of the First Amendment, but this amendment would remove the Court's discretion on the matter and require the Court to apply the *Johnson* and *Eichman* holdings, and that's why we oppose this particular gentleman's amendment.

Mr. WATT. Would the gentleman yield?

Mr. HOSTETTLER. Will the gentleman answer my question that—

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. I ask unanimous consent the gentleman be given one additional minute, and I ask the gentleman to yield.

Chairman SENSENBRENNER. Without objection.

Mr. HOSTETTLER. I'd like to ask the gentleman a question. I appreciate that. Does the gentleman believe that according to the power to amend the Constitution and the oath that you took to support the Constitution, does the gentleman not believe that the Constitution grants the Congress the authority to construe the Constitution according to the will of the Congress?

Mr. WATT. I absolutely believe that Congress has the initial authority to do that, but the Supreme Court has the ultimate authority to decide whether what we do is constitutional. I do believe that, yes.

I've at least answered the question. Would you answer a question now?

Mr. HOSTETTLER. Yes.

Mr. WATT. And Mr. Chabot, if he wants to answer it too. Once the Congress does something pursuant to this amendment, would you gentlemen agree that it must be consistent with the First Amendment?

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. WATT. I ask unanimous consent for two additional minutes so that maybe they'll answer the question that I'm asking.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. I'm asking you whether once Congress does something pursuant to this amendment, you would have to do it consistent with the provisions of the First Amendment?

Mr. HOSTETTLER. Given that it's my time, yes, and that's why I'm going to vote for the statute to stop the physical desecration of the flag, because I have that capability to construe the First Amendment just as the Supreme Court does, as the gentleman just suggested in his response to my question.

Mr. WATT. Would the gentleman yield further if you would. And does the gentleman think that his determination of what desecration means can be inconsistent with what the Supreme Court says it means, and that he will win ultimately?

Mr. HOSTETTLER. Well, as the gentleman knows, the Supreme Court is more than capable of opining on anything that they so desire.

Mr. WATT. Opining? What are you talking about? The Supreme Court is the ultimate opiner in this process. What do you mean is capable of opining?

Mr. HOSTETTLER. Well, that—I agree with that. I agree with that.

Mr. WATT. There are many times that I disagree with what the Supreme Court opines, but you don't argue with the fact that they are the ultimate opiner, I assume?

Mr. HOSTETTLER. Well, no, not the ultimate opiner, exactly.

Chairman SENSENBRENNER. In my opinion, the time of the gentleman has once again expired.

For what purpose does the gentleman from California seek recognition?

Mr. BERMAN. I move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I'm wondering if on my time the gentleman from Indiana could indicate—has he heard of this case, *Marbury v. Madison*? Have you heard of the case, *Marbury v. Madison*?

Mr. HOSTETTLER. Yes, I have.

Mr. BERMAN. And do you accept that decision as affecting the question of who is chief opiner, about the constitutionality of—

Mr. HOSTETTLER. Chief opiner, yes, I do.

Mr. BERMAN. You accept that?

Mr. HOSTETTLER. I do, I do. Will the gentleman yield?

Mr. BERMAN. Yes.

Mr. HOSTETTLER. Has the gentleman read *Marbury v. Madison*?

Mr. BERMAN. Yes.

Mr. HOSTETTLER. And what was the practical result of John Marshall's suggestion to Jefferson that he seat Mr. Marbury? Did Mr. Jefferson—in other words, did Mr. Jefferson seat Mr. Marbury?

Mr. BERMAN. Whether he did? You mean afterwards?

Mr. HOSTETTLER. Yes.

Mr. BERMAN. Tell me why that's relevant.

Mr. HOSTETTLER. Well, you're asking me if they're the opiner. My question to you is, is did what the Supreme Court opined come to pass?

Mr. BERMAN. I take your point. Therefore——

Mr. HOSTETTLER. The question——

Mr. BERMAN. I take your point. Given your view of this, why do you need this constitutional amendment? You, as a Member of Congress, and apparently a majority of the Congress, presumably at one point in the recent history and now, think that physical desecration of the flag, prohibiting that is not an infringement on First Amendment rights. So why do you need a constitutional amendment to pass a law that prohibits physical desecration of the flag?

Mr. HOSTETTLER. Will the gentleman yield?

Mr. BERMAN. Yes.

Mr. HOSTETTLER. I personally believe that the flag is the very most unique symbol of the United States of America, and I believe that it requires the respect due to it——

Mr. BERMAN. So what—I appreciate that. Why don't you just—why do you need to amend the Constitution? You don't think physical desecration of the flag violates the First Amendment? You accept there is a First Amendment. You don't think physical desecration of the flag violates the First Amendment? Why do you need a constitutional amendment?

Mr. HOSTETTLER. Do you want me to repeat what I just said? Because I believe that the flag is a very unique instrument, representing the United States of America.

Mr. BERMAN. So why don't you introduce a bill to prohibit the physical desecration of the flag because it is a unique symbol of the United States.

Mr. HOSTETTLER. Will the gentleman yield?

Mr. BERMAN. Yes.

Mr. HOSTETTLER. Because as being a unique symbol of the United States, I believe it deserves attention of the United States Constitution.

Mr. BERMAN. All right, I understand.

Mr. CHABOT. Would the gentleman yield for a moment? The gentleman yield?

Mr. BERMAN. I will be happy to yield.

Mr. CHABOT. I thank the gentleman for yielding. Just getting back to the ultimate opiner, I think the ultimate opiner is really the people of this country, and when the Supreme Court gets it wrong, and once in a while they do, the people of this country, through their elected representatives, and that's us, can amend the Constitution, and then that's the document that the Supreme Court will review and will act through, and a lot of us think the Supreme Court did get it wrong in this one, and that's why we're attempting to do the only thing that we can do, which is to amend the Constitution. If we could do it through a statute, we'd do it. We tried that. They threw that out. So the only thing——

Mr. BERMAN. Reclaiming my time, that I understand, and that's why you want a constitutional amendment. My question then to the author of this amendment, is, I'm not sure what you mean

when you—when you offered this amendment and say that this amendment, plus any law adopted pursuant to it, could be struck down as violating the First Amendment, I don't understand that argument, and I was wondering if you could explain that. Because it seems to me this amendment is intended to limit and narrow the First Amendment of the Constitution, and your amendment seems to be the same as just defeating the underlying constitutional amendment, and why isn't the right position for one who agrees with your position to simply vote no on this matter, on the underlying constitutional amendment? I thought I heard you say that even if Congress passes this constitutional amendment and it's ratified by the States, and Congress passes a law prohibiting physical desecration of the flag, to the extent that that law infringes on First Amendment rights, that law will be rendered unconstitutional by the Supreme Court.

To me, that doesn't seem to be the case. It sounds to me like this amendment has a very specific limitation.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BERMAN. I'd ask unanimous consent for one additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. BERMAN. To explain to me why you're offering—what your point is with this amendment.

Mr. WATT. My point is that whenever Congress gets around to doing whatever it must do to prohibit the desecration of the flag, I want Congress to be absolutely cognizant that it must do that carefully and consistently with the First Amendment.

Mr. BERMAN. And to reclaim my time, I don't understand why you say that, because it seems to me what this amendment is about is to tell the Congress you don't have to care about the First Amendment when you're legislating on the physical desecration of the flag because this amendment narrows, I think inappropriate and wrongly, the breadth of the First Amendment.

Mr. NADLER. Will Mr. Berman yield?

Mr. BERMAN. I'm happy to yield.

Mr. NADLER. Would the gentleman yield for a second? I think the point of this amendment—

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. To strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. I think the purpose of this amendment is precisely to illustrate the point the gentleman from California makes. Obviously this amendment infringes on the First Amendment. Obviously, if passed, it would supersede the First Amendment to the extent to which it conflicted with it, and the amendment offered by the gentleman from North Carolina is simply intended to point that out, so that the nonsense about this amendment not being a restriction of freedom of speech rights is pointed out for the nonsense which it is.



Mr. Chairman, I want to read two letters, one from General Colin Powell. It was written 3 years ago, 4 years ago to Senator Leahy, in which he says: "Dear Senator Leahy, I love our flag, our Constitution and our country with a love that has no bounds. I defended all three for 35 years as a soldier, and was willing to give my life in their defense. Americans revere their flag as a symbol of the Nation. Indeed it is because of that reverence that the amendment is under consideration. We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things, and when they do, they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration. If they're destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead. I understand how strongly so many of my fellow veterans and citizens feel about the flag, and I understand the powerful sentiment in the State legislatures to such an amendment. I feel the same sense of outrage, but I step back from amending the Constitution to relieve that outrage. The First Amendment exists to ensure that freedom of speech and expression applies not just to that with which we agree or disagree, but also to that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away. Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment. If I were a Member of Congress I would not vote for the proposed amendment. I would fully understand and respect the views of those who would. For or against we all love our flag with equal devotion. Sincerely, Colin Powell. P.S. The attached 1989 article by a Vietnam POW gave me further inspiration for my position."

And I will now read an excerpt from that article in which I think it's Captain—Major James Warner writes as follows. "In March 1973, when we were released from a prisoner of war camp in North Vietnam, we were flown to Clark Air Base in the Philippines. As I stepped out of the aircraft, I looked up and saw the flag. I caught my breath then as tears filled my eyes. I saluted it. I never loved my country more than at that moment, although I have received the Silver Star Medal and two Purple Hearts, they were nothing compared with the gratitude I felt then for having been allowed to serve the cause of freedom. Because the mere sight of the flag meant so much to me when I saw it for the first time after 5½ years, it hurts me to see other Americans willfully desecrate it. But I have been in a communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself."

And he goes on to talk about his time in a communist POW camp, in which he said, "I did not appreciate this power that is the power of ideas, the teaching of these communist captors before I was a prisoner of war. I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. There, the officer said, people in your country pro-

test against your cause. That proves you are wrong. No, I said. That proves that I am right. In my country we are not afraid of freedom even if it means that people disagree with us. The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain compounded by fear in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.”

And Irwin Bevin of the British Labor Party was once asked by Nikita Krushchev how the British definition of democracy differed from the Soviet view. Bevin responded forcefully that if Krushchev really wanted to know the difference, he should read the funeral oration of Pericles. In that speech Pericles contrasts the Democratic Athens with totalitarian Sparta. Unlike the Spartans, he said the Athenians did not fear freedom. Rather they viewed freedom as the very source of their strength. As it was for Athens, so it is for America. Our freedom is not to be feared, for our freedom is our strength. We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? Spread freedom. The flag in Dallas was burned to protest the nomination of Ronald Reagan, and he told us how to spread the idea of freedom when he said that we should turn America into a city shining on a hill, a light to all nations. Don't be afraid of freedom is the best weapon we have.

I think this letter from Colin Powell, which I ask unanimous consent to insert in the record——

Chairman SENSENBRENNER. Without objection.

[Secretary Powell's letter follows:]

GENERAL COLIN L. POWELL, USA (RET)  
909 NORTH WASHINGTON STREET, SUITE 767  
ALEXANDRIA, VIRGINIA 22314

MAY 18, 1999

The Honorable Patrick Leahy  
United States Senate  
Washington, DC 10510-4502

Dear Senator Leahy,

Thank you for your recent letter asking my views on the proposed flag protection amendment.

I love our flag, our Constitution and our country with a love that has no bounds. I defended all three for 35 years as a soldier and was willing to give my life in their defense.

Americans revere their flag as a symbol of the Nation. Indeed, it is because of that reverence that the amendment is under consideration. Few countries in the world would think of amending their Constitution for the purpose of protection such a symbol.

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration.

If they are destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead.

I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.]

Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment.

If I were a member of Congress, I would not vote for the proposed amendment and would fully understand and respect the views of those who would. For or against, we all love our flag with equal devotion.

Sincerely,



P.S. The attached 1989 article by a Vietnam POW gave me further inspiration for my position.

Mr. NADLER. And this article by Major James Warner, which I also ask unanimous consent to—

Chairman SENSENBRENNER. Without objection, and the gentleman's time has expired.

[The Washington Post article follows:]

James H. Warner

#### **WHEN THEY BURNED THE FLAG BACK HOME**

*Thoughts of a former POW*

On March of 1973, when we were released from a prisoner of war camp in North Vietnam, we were flown to Clark Air Force base in the Philippines. As I stepped out of the aircraft I looked up and saw the flag. I caught my breath, then, as tears filled my eyes, I saluted it. I never loved my country more than at that moment. Although I have received the Silver Star Medal and two Purple Hearts, they were nothing compared with the gratitude I felt then for having been allowed to serve the cause of freedom.

Because the mere sight of the flag meant so much to me when I saw it for the first time after 5 1/2 years, it hurts me to see other Americans willfully desecrate it. But I have been in a Communist prison where I looked into the pit of hell. I cannot compromise on freedom. It hurts to see the flag burned, but I part company with those who want to punish the flag burners. Let me explain myself.

Early in the imprisonment the Communists told us that we did not have to stay there. If we would only admit we were wrong, if we would only apologize, we could be released early. If we did not, we would be punished. A handful accepted, most did not. In our minds, early release under those conditions would amount to a betrayal, of our comrades, of our country and of our flag.

Because we would not say the words they wanted us to say, they made our lives wretched. Most of us were tortured, and some of my comrades died. I was tortured for most of the summer of 1969. I developed beriberi from malnutrition. I had long bouts of dysentery. I was infested with intestinal parasites. I spent 13 months in solitary confinement. Was our cause worth all of this? Yes, it was worth all this and more.

Rose Wilder Lane, in her magnificent book "The Discovery of Freedom," said there are two fundamental truths that men must know in order to be free. They must know that all men are brothers, and they must know that all men are born free. Once men accept these two ideas, they will never accept bondage. The power of these ideas explains why it was illegal to teach slaves to read.

One can teach these ideas, even in a Communist prison camp. Marxists believe that ideas are merely the product of material conditions; change those material conditions, and one will change the ideas they produce. They tried to "re-educate" us. If we could show them that we would not abandon our belief in fundamental principles, then we could prove the falseness of their doctrine. We could subvert them by teaching them about freedom through our example. We could show them the power of ideas.

I did not appreciate this power before I was a prisoner of war. I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag. "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."

"No," I said. "That proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him.

Aneurin Bevan, former official of the British Labor Party, was once asked by Nikita Khrushchev how the British definition of democracy differed from the Soviet view. Bevan responded, forcefully, that if Khrushchev really wanted to know the difference, he should read the funeral oration of Pericles.

In that speech, recorded in the Second Book of Thucydides' "History of the Peloponnesian War," Pericles contrasted democratic Athens with totalitarian Sparta. Unlike the Spartans, he said, the Athenians did not fear freedom. Rather, they viewed freedom as the very source of their strength. As it was for Athens, so it is for America — our freedom is not to be feared, for our freedom is our strength.

We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom?

Spread freedom. The flag in Dallas was burned to protest the nomination of Ronald Reagan, and he told us how to spread the idea of freedom when he said that we should turn America into "a city shining on a hill, a light to all nations." Don't be afraid of freedom, it is the best weapon we have.

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*The writer, a Washington attorney and former Marine flyer, was a prisoner of the North Vietnamese from October 1967 to March 1973. The article appeared in The Washington Post on July 11, 1989.*

Mr. NADLER. 30 additional seconds, please, Mr. Chairman?

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you. Really explain probably better than most of us at this table could, the fundamental objection to this amendment. This amendment is intended to narrow freedom of expression because of the expression of ideas which we don't agree with, and therefore, this amendment ought to be rejected.

Thank you and I yield back.

Chairman SENSENBRENNER. The gentleman's time has once again expired.

The question is on the——

Mr. JENKINS. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Tennessee, Mr. Jenkins, seek——

Mr. JENKINS. To strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. JENKINS. Mr. Chairman, I would like to yield to the gentleman from Ohio, the Chairman of the Subcommittee, who has additional letters that need to be read into the record.

Mr. CHABOT. I thank the gentleman for yielding.

I have great respect for Secretary Powell, as I think most of the people in this room probably do. The fact is, approximately 80 percent of the American people, the overwhelming number of veterans in this country, support this particular, the flag amendment, and I'd like to take a moment to read—and I don't want to have dueling letters here—but I have a letter from General Schwartzkopf.

"With the recent introduction of the Flag Protection constitutional amendment, which I understand may soon come up, I'm writing to urge your support for this important measure. I am aware and respectful of the difficulty of this decision. My purpose in writing is to share with you my views and reasons for supporting the Flag Amendment in hopes that you will factor them into your deliberations on the matter. I regard legal protections for our flag as an absolute necessity and a matter of critical importance to our Nation. The American flag, far from a mere symbol or a piece of cloth, is an embodiment of our hopes, freedoms and unity. The flag is our national identity. I am honored to have commanded our troops in the Persian Gulf War, and humbled by the bravery, sacrifice and love of country so many great Americans exhibited in that conflict. These men and women fought and died for the freedoms contained in the Constitution and the Bill of Rights and for the flag that represents these freedoms. Their service and valor are worthy of our eternal respect. Most of these great heroes share my view that there is no threat to any right or freedom in protecting the flag for which they fought. Perhaps as much as any American, they embrace the right to free speech. Indeed, they risk death to protect it. I do, however, see a very real threat in the defilement of our flag. We are a diverse people, living in a complicated, fragmented society. I believe we are imperiled by a growing cynicism toward certain traditions that bind us, particularly service to our Nation. The flag remains the single preeminent connection among all Americans. It represents our basic commitment to each other and to our country. Legally sanctioned flag desecration can only serve to further undermine this national unity and

identity that must be preserved. I am proud to lend my voice to those of a vast majority of Americans who support returning legal protections for the flag. This is an effort inspired by our Nation's history and our common traditions and understanding under which, until a very recent and controversial Supreme Court decision, the American flag was afforded legal protection from acts of desecration. The Flag Protection constitutional amendment is the only means of returning to the people the right to protect their flag. H. Norman Schwartzkopf, General, U.S. Army Retired."

I yield back. Thank the gentleman for yielding.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee?

Ms. JACKSON LEE. Mr. Speaker, I ask to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Speaker.

Thank you, Mr. Watt. I put Mr. Sensenbrenner in an uplifting position, but I know he prefers to be called "Chairman."

In any event, I do want to put this in the context of where we are today. I'm not sure whether we are discussing this legislation inasmuch as a couple of days from now we will have the opportunity to pay tribute to the fine men and women who live but, in particular, those who are willing to give the ultimate sacrifice on behalf of this Nation. And there is no greater honor and respect that can be given than to acknowledge that freedom is not free, and that every day that we're allowed to debate in the manner that we're debating here in this room and on the floor of the House, we can be grateful not only for those who provide protection today but for the thoughtfulness and the depth of understanding of what freedom and democracy means that seem to be evidenced by the Founding Fathers who designed the Constitution and the Bill of Rights.

The Bill of Rights has in it the First Amendment, which allows the freedom of expression, speech, freedom of association, and freedom of religion. We have clearly been aided by the fact that we do not have an established religion in this Nation, and so everyone is allowed to go to their respective houses of worship, worship on any day, and utilize their religion for defense of many actions.

Freedom of movement allows us to move about this country. In spite of the threats of terrorism and recent legislation this Nation is unique in its ability to move about, the freedom of which its people have access to.

And I think this amendment that Mr. Watt has offered is an amendment that is precise in its language, if I am reading it correctly: that we add to this legislation that whatever we do not be inconsistent with the First Amendment.

And what is the First Amendment? I don't believe we should use the freedom that we have to threaten others who are using the freedom that they have. I don't believe that one's sense of handling of the flag of the United States because someone desires to express their opposition by handling the flag is a reflection on my respect and admiration for the flag and my right to worship it or love it or nurture it or respect it.

But I do believe that if we pass this legislation, though I know that this has been moving through the Congress for a very long time, or it seems that we vote on this every single year, I do believe that despite the intensity of emotions that are expressed here even in this room, that we're really not capturing what this Nation is about.

I would imagine someone would say someone's disrespect—or someone's freedom is someone else's disrespect, and I disagree with it. Freedom is within your heart, your understanding, and the Constitution and the Bill of Rights. And the Bill of Rights makes it very clear. We're not allowed to say "Fire" or we can challenge the idea of saying "Fire" in a crowded stadium or crowded theater, but I see that there is no seemingly basis in the Constitution to prevent someone from expressing their viewpoint, whether it is to reject the Constitution by some action or reject the flag of the United States by some action.

We do ourselves a disservice if we take the Constitution today and burn it, by suggesting that we cannot express our viewpoints, and that you will be diminished, your service will be diminished because someone else does something to the flag of the United States.

My respect for it will be no less than it is today. I have never burned a flag, never desired to do so, never desecrated it—

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE.—but I understand the necessity of not having this legislation and support this amendment. And I would ask my colleagues to support the amendment and respect the Constitution.

I yield back.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I think we need to put this debate in a little context, and I would advise my friends in the first row to keep a good look as we discuss this on the budget as it pertains to veterans' benefits and to employee rights in the Department of Transportation as they're being sabotaged. There's a lot more going on in this Congress than just this bill.

Mr. Chairman, this amendment points to the inconsistency with the idea of the First Amendment, time, place, and manner. Recent reports, news reports in the last week or so, reflect that the President had appeared at a public event, and someone was holding up a sign critical of the President. Others in the same area were holding up signs consistent with the President, supportive of the President. And this protester was told to take his sign down if he expected to stay. He kept his insulting sign up, and he was arrested.

Now, I believe that is inconsistent with the ideals of the First Amendment, and we will just have to see how that prosecution goes. But the fact of the matter is, Mr. Chairman, this amendment will have to—this amendment will have to be dealt with one way or another. Either the underlying constitutional amendment will override the First Amendment or it won't. This at least answers

the question that it will not override the First Amendment to the Constitution. My view is that whatever you do, as the gentleman from North Carolina has said, has got to be consistent with the rest of the Constitution. But that's the question.

Now, if it's not consistent—if it's overrides the First Amendment, what else does it override? Does it say—does it override the First Amendment in terms of speech? Well, if this amendment is not adopted, then maybe it does. What about religion? If you pass a statute saying that you could establish a prayer for the flag, that would be inconsistent with the other part of the First Amendment. Will that be overridden? How about some people can burn a flag and some cannot in violation of the 14th, the equal protection clauses? Will that be overridden by this? Or will the rest of the Constitution be there as it is?

Anything that you do under this is either consistent with the rest of the Constitution or you're trumping the rest of the Constitution. At least we ought to be honest and answer that question.

I would suggest if you do not agree with this as it's written, then offer a second-degree amendment that says whether or not it's inconsistent with the First Amendment to the Constitution, whatever you do under this provision will be okay. At least we'd know what the rules are, and as has been pointed out, it will be part of the Constitution, and you're home free.

But before we pass this amendment, let's at least let the people of the United States know what we pass. This says that you can't do anything under this proposed constitutional amendment that is not consistent with the Bill of Rights. I would hope that would be the view of the Committee, and I'd, therefore, hope that we would pass the amendment.

I yield back.

Chairman SENSENBRENNER. The Chair would bring to the attention of the Members House rule XVII, clause 7, which applies to the Committee. It says, "During a session of the House, it shall not be in order for a Member, delegate, or resident commissioner to introduce to or bring to the attention of the House an occupant of the galleries of the House." So references to people in the audience are in contravention of that rule and should be avoided.

For what purpose does the gentleman from Indiana seek recognition?

Mr. PENCE. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. PENCE. Thank you, Mr. Chairman.

I would respectfully oppose the gentleman from North Carolina's amendment, and I do think, as my friend just said, it's important to put a little bit of perspective on this debate.

It seems to me—and I'm just a small-town boy from southern Indiana, Mr. Chairman, but it does seem to me that this issue really isn't about the niceties and the vagaries of what the First Amendment does and does not apply to. In fact, the First Amendment does not even contain a reference to time, place, and manner. This is really about the very form and fabric of this Government.

There are only three different times—types of government that men have conceived of throughout recorded history, Mr. Chairman: dictatorship, oligarchy, and democracy. This Nation was founded on



the principles of representative democracy. We all know what dictatorship is. Oligarchy is when a very small group of people make decisions that they then impose on the populace.

And I would offer to you today, with all due respect to my colleagues who want to talk about their deep concern for people having the ability to burn colored fabric, this debate today and this constitutional amendment goes to the very fabric of the form of government that we will enjoy in this country in the next century.

Nineteen and eighty-nine, the United States Supreme Court, lost in the weeds of creative writing, decided to strike down the statutes that made flag desecration and burning in 50 States, since time and memory runneth not to the contrary, they decided to strike that down out of some strange reading of the First Amendment of the Constitution. I will speak it plainly, Mr. Chairman, against the hope that some might be listening somewhere.

Concluding that an act by an individual is covered by the speech clauses of the Constitution of the United States of America, they banned this act and in so doing, I would offer, acted as a super legislature. The nine people of the United States Supreme Court concluded, Mr. Chairman, that they and not the elected Republicans and Democrats and Independents of the 50 State legislatures of this country would decide what was and was not——

Mr. NADLER. Would the gentleman yield for a question?

Mr. PENCE. I will not yield. I'm sure there will be plenty of time elsewhere.

I believe this issue, Mr. Chairman, goes to whose country this is. More than 80 percent, we've heard again and again and again, more than 80 percent of the American people would like for this Congress to have the ability and State jurisdictions to have the ability to give a parking ticket to that under which my father was buried and fought and that under which every patriot who has bled and died for this country has fought. The desecration of that as an act of civil disobedience, time-honored tradition in America, and getting a parking ticket infraction penalty for it ought to remain so.

This is about this Congress, Mr. Chairman, asserting its ability to express the community standards in this democracy of the people of the United States of America. We heard an interesting discussion earlier, Mr. Chairman, about who is the ultimate opiner. Well, I would offer to you today humbly that our Constitution does not begin with the phrase "We, the Supreme Court" or "We, the elites of the United States of America, in order to form a more perfect union . . ." It's "We, the people . . ." And the debate that we will have today and the debate that we will bring out of this Judiciary Committee and onto the floor of the Congress I believe is that profound.

And I urge opposition to the amendment, and I urge strong support for the constitutional amendment. It is about whose country this is. And it is about this Congress reasserting that this is a representative democracy, and the voice of the people, the standards of the people, the passion and patriotism of the people of this Nation will be heard.

And I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on the Watt amendment. Those in favor will say aye? Opposed, no?

The noes appear to have it——

Mr. WATT. I ask for a rollcall.

Chairman SENSENBRENNER. A rollcall will be ordered. Those in favor of the amendment offered by the gentleman from North Carolina, Mr. Watt, will as your names are called answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

[No response.]

The CLERK. Ms. Hart?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Carter?

Mr. CARTER. No.

The CLERK. Mr. Carter, no. Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no. Mrs. Blackburn?

Mrs. BLACKBURN. No.

The CLERK. Mrs. Blackburn, no. Mr. Conyers?

[No response.]

The CLERK. Mr. Berman?

Mr. BERMAN. No.

The CLERK. Mr. Berman, no. Mr. Boucher?

[No response.]

The CLERK. Mr. Nadler?

Mr. NADLER. No—I mean, yes.  
 The CLERK. Mr. Nadler, aye. Mr. Scott?  
 Mr. SCOTT. Aye.  
 The CLERK. Mr. Scott, aye. Mr. Watt?  
 Mr. WATT. Aye.  
 The CLERK. Mr. Watt, aye. Ms. Lofgren?  
 Ms. LOFGREN. Aye.  
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?  
 Ms. JACKSON LEE. Aye.  
 The CLERK. Ms. Jackson Lee, aye. Ms. Waters?  
 Ms. WATERS. Aye.  
 The CLERK. Ms. Waters, aye. Mr. Meehan?  
 [No response.]  
 The CLERK. Mr. Delahunt?  
 [No response.]  
 The CLERK. Mr. Wexler?  
 Mr. WEXLER. Aye.  
 The CLERK. Mr. Wexler, aye. Ms. Baldwin?  
 Ms. BALDWIN. Aye.  
 The CLERK. Ms. Baldwin, aye. Mr. Weiner?  
 Mr. WEINER. Aye.  
 The CLERK. Mr. Weiner, aye. Mr. Schiff?  
 Mr. SCHIFF. Aye.  
 The CLERK. Mr. Schiff, aye. Ms. Sánchez?  
 Ms. SÁNCHEZ. Aye.  
 The CLERK. Ms. Sánchez, aye. Mr. Chairman?  
 Chairman SENSENBRENNER. No.  
 The CLERK. Mr. Chairman, no.  
 Chairman SENSENBRENNER. Are there Members who wish to cast or change their vote? The gentleman from Massachusetts, Mr. Meehan.  
 Mr. MEEHAN. Aye.  
 The CLERK. Mr. Meehan, aye.  
 Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller?  
 Mr. KELLER. No.  
 The CLERK. Mr. Keller, no.  
 Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart?  
 Ms. HART. No.  
 The CLERK. Ms. Hart, no.  
 Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus?  
 Mr. BACHUS. No.  
 The CLERK. Mr. Bachus, no.  
 Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler?  
 Mr. HOSTETTLER. No.  
 The CLERK. Mr. Hostettler, no.  
 Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.  
 The CLERK. Mr. Chairman, there are 12 ayes and 19 noes.  
 Chairman SENSENBRENNER. And the amendment is not agreed to.  
 Are there further amendments?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. I rise to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, I have to comment on something that our last speaker before the vote—I think it was Mr. Pence—was saying after he refused to yield. He made a couple comments.

Essentially, he said that most people in this country don't agree with flag burning and if the Supreme Court said that that violates the First Amendment, well, by God, we have the right to prohibit speech that we don't agree with. And that's the essence of this amendment, and I'm glad he was direct enough to pretty much say so.

What this amendment really says is if we don't like a certain kind of speech where we define or what Congress in the future will define as flag desecration because we don't agree with the ideas, we will ban them. And that's a very straight violation of the First Amendment. It's a straight abrogation of the Bill of Rights. It's the essence of dictatorial government, frankly, but I understand the feeling. We all share feelings of revulsion at people who do such things. But some people want to give in to those feelings of revulsion and narrow freedom of speech, and that's what this is about.

Secondly, I appreciate the gentleman's consideration of the Supreme Court as an oligarchy and his lack of appreciation for the Supreme Court telling the majority of the American people what to do. I agree. I mean, a couple years ago, the Supreme Court imposed on the American people a President that most of the American people voted against. But we recognize that the Supreme Court is the final arbiter, not the final opiner in our system, and unless we want to have civil wars, we have to let them ultimately have that decision. So we live until the next election with a President imposed on the people of the United States by a Supreme Court which chose to impose a President who most of the American people voted against, didn't even get a plurality of the vote. Vice President Gore got more votes than anybody else, but he's not the President because the Supreme Court said so. That's our system.

Now, if we want to invent a better system, maybe we will. But I appreciate the frustration of the gentleman at the role of the Supreme Court. I would choose to live with that, with Presidential elections and with protection of free speech.

I yield back.

Chairman SENSENBRENNER. The Chair strikes the last word.

I think to get this debate back in the context, the First Amendment does not give an absolute right for anybody to have free speech. One cannot yell "Fire" in a crowded theater. One cannot make a defamatory comment against another. Those are limitations on an absolute right for free speech.

Secondly, the Constitution has been amended upon occasion to reverse Supreme Court decisions. The 11th Amendment, in the first decade of the Constitution, reversed a Supreme Court decision. The 16th Amendment on income taxes reduced a Supreme—reversed a Supreme Court decision. I think it arguably can be said

that certain provisions of the 14th Amendment reversed the Dred Scott decision.

So when Congress and the several States have determined that the Supreme Court is wrong and is off base, the proper way to go about it is through the amendatory process. That's what we're doing here, and that's why this amendment is a valid vote on whether or not this Committee agrees with the two Supreme Court decisions on flag desecration. And I yield back the balance of my time.

Are there further amendments? The gentleman from—are there further amendments? The gentleman from California, Mr. Berman.

Mr. BERMAN. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I yield my time to the gentleman from New York.

Mr. NADLER. I thank the gentleman for yielding.

Mr. Chairman, Congress has indeed amended the—or Congress and the State legislatures have indeed amended the Constitution to overturn Supreme Court decisions in the past. There's absolutely nothing wrong with that.

What we have never thus far done, until this amendment that we're considering now—we've considered other amendments, but we've never passed other amendments that have narrowed any of the protections of the Bill of Rights. That's what this amendment would do. It would narrow the Supreme Court's interpretation of freedom of speech in the First Amendment. We have never adopted an amendment—you are quite right. Free speech is not absolute. You can't shout "Fire" in a crowded theater. The Supreme Court interpreted the First Amendment to permit that kind of limitation.

What we have never done is to pass an amendment to narrow the Supreme Court's interpretation of any of the amendments constituting the Bill of Rights. It would be a terrible thing to start doing that, and that's another objection to this amendment because that's what we would be doing. We would be saying that the Supreme Court's interpretation of what freedom of speech is is too broad and the American people must live with a narrower interpretation of the freedom of speech in the First Amendment than the Supreme Court has done because we judge that flag desecration is so terrible. And why are we going to establish this terrible precedent of amending the Bill of Rights by constitutional amendment for the first time to narrow it? Because of the plethora of flag desecrations? How many are there? Where's the problem? If there were a problem, I don't think we should deal with it this way. We should deal with it through ridicule and through better speech. The remedy for bad speech, as Jefferson said, is good speech. Ridicule the people who do it. Point out how wrong they are. Trust that the American people will judge their competing ideas and choose the right one. That's the American way.

But even that aside, we don't see the problem. I don't see any great number of flag desecrations that we're worried about.

I yield—well, I thank the gentleman for yielding and I yield back.

Mr. BERMAN. Just on the issue of *Marbury v. Madison*, from the USIA website—that's the site that's there for the rest of the world to see about the American system—there's an explanation of

*Marbury v. Madison*. The critical importance of *Marbury* is the assumption of several powers by the Supreme Court. One was the authority to declare acts of Congress and, by implication, acts of the President unconstitutional if they exceeded the powers granted by the Constitution. But even more important, the Court became the arbiter of the Constitution, the final authority on what the document meant. As such, the Supreme Court became, in fact as well as in theory, an equal partner in government and it has played that role ever since, the gentleman from Indiana notwithstanding.

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. Are there further amendments?

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, do you have an amendment?

Ms. WATERS. No. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. WATERS. Thank you very much. Mr. Chairman and Members, I've been over in another Committee, and I have not been here for all of the debate and the discussion on this legislation. I'm pleased to have a minute or so to talk about this amendment and this legislation. I think it's very important for me to place in the record my strong support for the flag, my respect for the flag. However, I see this particular legislation as being very divisive and misdirected.

Some of us have organized in this Congress to try and protect veterans. This Administration is proposing cuts to our veterans that I think are absolutely unconscionable. Many of us work day in and day out to support our veterans, to try and make sure that our veterans hospital are providing the services they should be, trying to get rid of these long waiting periods. Many of us fight to expand burial grounds. Many of us fight to get rid of co-payments. And we think that the attention that we should be paying to our veterans is being deflected by this kind of legislation.

I support Mr. Watt's amendment, and I just want to share with all of those who are here today that we should not be divided, particularly at a time when we are trying to fight terrorism and provide homeland security. This is not the time to be divided about flag desecration.

We do have a Constitution. We do have First Amendment rights. We may not always like the fact that they provide protection in certain ways that are important to a democracy. But I think we would all be better off if we stood up for veterans and we stood up for the rights of veterans to have a decent quality of life once they have served in the military and that we're willing to put our money where our mouths are and make sure that in this budget that is being debated at this time in the Congress of the United States, instead of hiding and supporting cuts to our veterans and waving the flag on desecration, we should indeed be talking about how we honor that flag by supporting the veterans and making sure that they have a decent quality of life after they have served.

I yield back the balance of my time.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. Are there further amendments?

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, do you have an amendment?

Mr. WATT. No, sir. I move to strike the last word on the bill.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman, and I won't, hopefully, use the whole 5 minutes. But I thought in the interest of exercising my free speech rights for this short period, I would disagree with both the Chairman and Mr. Nadler's characterization of what this bill does and make it absolutely clear that this bill does not overturn decisions of the Supreme Court. There's nothing in this bill that does that. Nor does it directly undermine the First Amendment to the Constitution, as Mr. Nadler says.

All this bill does in the interest of honesty—and if everybody is honest about it, you will read the language. All it says is that the Congress shall have power to prohibit the physical desecration of the flag of the United States.

When Congress exercises that power, it will have to exercise it consistent with the First Amendment to the Constitution, in my opinion.

Mr. NADLER. Would the gentleman yield?

Mr. WATT. My amendment would have made that absolutely explicit, but in my opinion, whether we pass my amendment or didn't pass my amendment, I think whatever Congress does to exercise the power to prohibit the physical desecration of the flag will have to be done consistent with the First Amendment.

So we haven't overruled any Supreme Court decision. We haven't overruled the First Amendment. Life is going to go on in this country whether this amendment passes or not, just as life went on after the Supreme Court decided what it did in the Presidential situation.

Mr. NADLER. Would the gentleman yield?

Mr. WATT. Our democracy is strong enough to withhold any of this craziness, including our efforts to be lost in the weeds of creative writing here. We are not going to do anything that is inconsistent with the Constitution, and I think we should be honest about this. This is all a political statement. It is all about exactly what Ms. Waters just talked about, hiding the fact that at the same time people are saying they are waving the flag and protecting the flag from desecration, they are cutting veterans' benefits and undermining the rights of Americans in ways that are unprecedented. And if we leave this debate with anything else, we will have missed that point.

Mr. NADLER. Will the gentleman yield?

Mr. WATT. I'm happy to yield to the gentleman.

Mr. NADLER. Thank you. I certainly agree with—I thank the gentleman for yielding. I'd certainly agree with Ms. Lofgren, but I think that I have to disagree with the gentleman's interpretation here. The Supreme Court said that a flag desecration statute—

Mr. WATT. I want you to exercise your free speech rights.

Mr. NADLER.—was a violation—without being consistent with this general bill. The Supreme Court said that a flag desecration statute was a violation of the First Amendment. This bill—this proposed amendment would say the Congress shall have the power to pass—to adopt a flag desecration amendment. What it doesn't say

in so many words but what it clearly means is despite the First Amendment or despite the Supreme Court's interpretation of the First Amendment to ban it. And clearly this amendment, as any amendment, supersedes prior amendments. And to the extent that it conflicts with the Supreme Court's prior interpretation of the First Amendment, it would prevail. So it does overturn a Supreme Court decision. It would clearly allow statutes the Supreme Court has said violates the First Amendment and, therefore, it would narrow the interpretation of the First Amendment. And, yeah, the country will survive, but then our people will be less free.

Mr. WATT. Can I just reclaim my time—

Mr. NADLER. Yes, sir.

Mr. WATT.—to say that I disagree with you, and I disagree with what the Chairman characterized, but that's the American way and that's—you know, that's what free speech is all about. And I think our Nation is going to survive this crisis. The question is our Nation going to survive the assaults on the rights of veterans and the assaults on the rights of the American people that are under—that are taking place in this country—

Chairman SENSENBRENNER. The gentleman's time has expired.

Ms. JACKSON LEE. Mr. Chairman? Mr. Chairman? Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas—

Ms. JACKSON LEE. Strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I simply want to respond to the statements made by the Chairman on the number of amendments that have amended the Constitution, and he's certainly accurate.

I would make the argument that on those amendments there has been an enhancement of constitutional rights, particularly as relates to the 13th, 14th, and 15th Amendments which had to do with the question of abolishment of slavery and equality.

I think the issue that we have with this debate and the issue that I have—let me speak for myself. One is the timing and whether or not this question is being politicized. Before we leave this week to go home to mourn with those who have lost loved ones, served this country, one thing that I understand—and General Franks said it to me directly, that there is no divide in America on the support of the United States military, our troops, and the work and valiant sacrifice that has been made. There is no divide. Legislative initiatives like this, although people have a right to advocate for their position, are divisive. Why? Because it is restrictive.

And whether you make the argument that the Supreme Court will interpret or not interpret, I believe the Supreme Court will ultimately hear a case that involves this legislation and will make a decision. And I believe that it would take the case on the premise that someone will believe or some of a lot of people will believe that it is an infringement on their First Amendment rights. The question is then why do it? Because the flag in its glory is maintained no matter who decides to act upon the flag. The flag is a symbol of our freedom.



So I'm sorry that we have the legislation before us and that it attempts to divide us away from our military, our veterans, and also the First Amendment.

I would also just say that I have a veterans' hospital in my district, and I know that the veterans have been extremely active on this issue. But I would encourage you to get more energized because there are cuts, but particularly the bad part is the number of veteran's families and veterans in particular who are kept out of hospitals because they make above \$30,000 a year. If there is an outrage, that is certainly an outrage.

So I know we'll work together again on many issues, but I think this flag burning question and this timing and the fact that it is restrictive and it is not enhancing, it is not helpful, it does not provide for freedom, it takes away from freedom, it is unfortunate that we would have this legislation in the Judiciary Committee. But, again, this is the rule of the majority. They have the right to present legislation, and I think it's important for my colleagues to recognize that. And as I've been told by those who want to hear the Democratic perspective—and I don't particularly suggest there's a Democratic perspective—let me characterize or clarify that to say to hear a different perspective, that it is important that we raise our voices on this issue and express our opposition that this is, in fact, a restriction of the constitutional right of the First Amendment, and we can expect to see this not only to the Supreme Court but in our district courts around the Nation. And I would hope that we will find a way to move beyond this because it is this Committee's role, I believe, to enhance rights and respect rights as opposed to deny them.

I yield back, Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Schiff, seek recognition?

Mr. SCHIFF. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I thank the Chairman for the recognition.

This is an extraordinarily difficult issue, I think, for all of us. Although some have used flag burning as opportunity to demagogue, there are a great many Americans who feel very passionately that the flag ought to be protected, who are, as indeed I'm sure every Member of this Committee, appalled by the idea of desecrating the flag or burning the flag or destroying the flag disrespectfully.

At the same time, a great many Americans have an abiding faith and conviction in the First Amendment and are concerned with an intrusion into the broad protections of the First Amendment and the precedent that would set. And I have wrestled with this issue for years now, at times thinking constitutional amendment was the best approach, at times thinking otherwise.

I have come to believe that there is a better alternative, and that is a statutory alternative that Rick Boucher has introduced entitled the Flag Protection Act. And essentially this bill prohibits any person from destroying or damaging a flag of the United States with the intent to provoke imminent violence or a breach of the peace and in circumstances likely to produce imminent violence or breach of the peace. It also prohibits the damaging of a flag belonging to the United States, damaging a flag of another Federal land, and

the advantages of this is that I believe that this statute is constitutional, that it would meet the test of constitutional scrutiny. It is framed in a narrow enough fashion where it could pass without the necessity of amending the Constitution and consistent with all of our beliefs in the First Amendment.

Now, it is true that it does not go as far as a constitutional amendment because it would exclude someone from basically burning their own flag in conditions where it was not likely to provoke an incident, burning their own flag, for example, in the privacy of their own home. But it does have the advantage of making a national statement, of allowing the Congress of the United States and the President of the United States to make a strong statement of support for the flag, to enact criminal penalties for its destruction or desecration, and meet that genuine and heartfelt desire of the American people to support the flag, to protect that symbol, and to make a sincere acknowledgment of the passions of people who have fought for this country and died for this country, both who love the flag and who love the First Amendment.

And so I believe the better approach is a statutory approach that accomplishes many of our objectives but does not risk the erosion of any of the protections of the First Amendment.

I thank the Chair for yielding, and I yield back the balance of my time.

Mr. COBLE. [Presiding.] The gentleman's time has expired.

For what purpose does the gentleman from California seek recognition?

Mr. GALLEGLY. Mr. Chairman, I move to strike the last word.

Mr. COBLE. The gentleman is recognized for 5 minutes.

Mr. GALLEGLY. Mr. Chairman, there's been significant remarks made about who has supported veterans and who has not supported veterans, and I would submit to you that the record speaks much louder than mere words, and with that I would yield to the gentleman from Ohio, my good friend, Mr. Chabot.

Mr. CHABOT. Thank you for yielding, and I'm not going to take the whole time, but, again, the topic here today was the constitutional amendment to basically stop the desecration of the American flag in this country. But we've heard a number now of allegations that our side has cut veterans' benefits, has cut the veterans—it hasn't been really responded to yet, and I think it's appropriate that we get the truth out there, because there's been really a campaign of misinformation out there for some time, and veterans have been, unfortunately, deceived.

The fact is that in the bill that this Congress passed on April 11th, we allocated \$63.8 billion, and that is a 10.9 percent increase over last year. Let me repeat that: 10.9 percent increase over last year. So this allegation that we've cut veterans' benefits is just not true. And, in fact, relative to medical care for veterans, we had the highest ever increase in overall medical benefits for veterans in this bill.

So any of these allegations about cuts in veterans, they're just not true.

I thank the gentleman for yielding.

Mr. GALLEGLY. I yield back.

Chairman SENSENBRENNER. [Presiding.] The question—

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts—

Mr. DELAHUNT. I move—

Chairman SENSENBRENNER. Do you have anything you wish to say on the question at hand?

Mr. DELAHUNT. I move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The Chair will remind the gentleman from Massachusetts that there is a rule that requires that debate be relevant to the question which is currently on reporting favorably House Joint Resolution 4. And I look forward to hearing your thoughts on that topic for the next 5 minutes.

Mr. DELAHUNT. Well, I would ask the Chairman if the remarks just simply made by the gentleman from Ohio were restricted to the issue at hand.

Chairman SENSENBRENNER. The answer is no, but the Chair has been very liberal, which is uncharacteristic of him— [Laughter.]

Mr. DELAHUNT. It is certainly uncharacteristic.

Chairman SENSENBRENNER. The time has come to get back to what the rules require. The gentleman's recognized.

Mr. DELAHUNT. I thank the Chair.

You know, I support this particular amendment, but I think that an issue was raised by Mr. Watt in terms of the language. And, again, the language that he referred to, "the Congress shall have power to prohibit the physical desecration of the flag of the United States," there's no reference in there to any other constitutional provisions in the Bill of Rights. You know, we're creating here a certain legislative history, and I haven't heard any response that I think, other than a disagreement by Mr. Nadler, any disagreement as to the interpretation. And I think for the sake of clarity, I'd like to hear from someone on—you know, some Member of the Committee that is a principal proponent of the amendment. Otherwise, what we're doing here could very well go for naught.

And I would also take just 30 seconds to respond to the gentleman from Ohio on the issue of veterans' benefits. I see representatives of the various veterans organizations sitting here. If they want the truth, they should go and look at the Committee report that was drafted by the Republican Chair, Mr. Smith, in terms of the treatment of veterans in this country. I commend your attention to that particular document because that contains the truth.

And with that, I yield and seek a response to my question.

Chairman SENSENBRENNER. The Chair notes that the gentleman has 2 minutes and 20 seconds left.

Mr. CHABOT. Mr. Chairman, I was not—I didn't hear what the gentleman asked, so if he's directing it at me, I didn't hear what the question was.

Mr. DELAHUNT. Well, again, the gentleman from Ohio is the Chair of the Subcommittee that is sponsoring this, and I was posing the question that was raised by Mr. Watt. The drafting of this particular resolution, the operative language that he quoted, "the Congress shall have power to prohibit the physical desecration of the flag of the United States," would not seem, as he argued, to override any First Amendment concerns that I understand prompted the filing of this particular resolution.

Mr. CHABOT. Would the gentleman yield?

Mr. DELAHUNT. I yield.

Mr. CHABOT. Yes, I thank the gentleman for yielding.

What this particular constitutional amendment would do is it would give Congress the power to prohibit the physical desecration of the flag of the United States. The Congress would then go back and write a bill. Arguably, I think the Congress would do that because 50 State legislatures had it on the books. We had a Federal law on the books. They were struck down in a 5–4 decision by the Supreme Court.

If this would pass and somebody would challenge it, it could go back up to the United States Supreme Court and the Supreme Court could rule. They could look at the First Amendment. They could look at this amendment that we would have passed. They could look at that particular legislation that was written subsequent to this, and a decision would be made. We may end up—we could theoretically end up back here again sometime down the road if the Supreme Court on a 5–4 vote did something that the public, through their elected representatives—

Mr. DELAHUNT. Just taking back my time for purposes of clarification, what you're suggesting is then the—what prompted this, the filing of this particular resolution, was First Amendment concerns—rather, let me put it this way, the First Amendment concerns that have been raised are not particularly addressed by this constitutional amendment.

Mr. CHABOT. Would the gentleman yield?

Mr. DELAHUNT. Yes.

Chairman SENSENBRENNER. The gentleman's time has expired. The question—are there further amendments?

[No response.]

Chairman SENSENBRENNER. The question—a reporting quorum is present. The question is on reporting favorably House Joint Resolution 4. Those in favor will say aye. Opposed, no.

The ayes appear to have it.

Mr. CHABOT. Rollcall vote.

Chairman SENSENBRENNER. Rollcall is demanded. The question is on reporting House Joint Resolution 4 favorably. Those in favor will as your names are called answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?  
 Mr. HOSTETTLER. Aye.  
 The CLERK. Mr. Hostettler, aye. Mr. Green?  
 Mr. GREEN. Aye.  
 The CLERK. Mr. Green, aye. Mr. Keller?  
 Mr. KELLER. Aye.  
 The CLERK. Mr. Keller, aye. Ms. Hart?  
 Ms. HART. Aye.  
 The CLERK. Ms. Hart, aye. Mr. Flake?  
 [No response.]  
 The CLERK. Mr. Pence?  
 Mr. PENCE. Aye.  
 The CLERK. Mr. Pence, aye. Mr. Forbes?  
 Mr. FORBES. Aye.  
 The CLERK. Mr. Forbes, aye. Mr. King?  
 Mr. KING. Aye.  
 The CLERK. Mr. King, aye. Mr. Carter?  
 Mr. CARTER. Aye.  
 The CLERK. Mr. Carter, aye. Mr. Feeney?  
 Mr. FEENEY. Aye.  
 The CLERK. Mr. Feeney, aye. Mrs. Blackburn?  
 Mrs. BLACKBURN. Aye.  
 The CLERK. Mrs. Blackburn, aye. Mr. Conyers?  
 Mr. CONYERS. No.  
 The CLERK. Mr. Conyers, no. Mr. Berman?  
 Mr. BERMAN. No.  
 The CLERK. Mr. Berman, no. Mr. Boucher?  
 [No response.]  
 The CLERK. Mr. Nadler?  
 Mr. NADLER. No.  
 The CLERK. Mr. Nadler, no. Mr. Scott?  
 Mr. SCOTT. No.  
 The CLERK. Mr. Scott, no. Mr. Watt?  
 [No response.]  
 The CLERK. Ms. Lofgren?  
 Ms. LOFGREN. No.  
 The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?  
 Ms. JACKSON LEE. No.  
 The CLERK. Ms. Jackson Lee, no. Ms. Waters?  
 [No response.]  
 The CLERK. Mr. Meehan?  
 Mr. MEEHAN. No.  
 The CLERK. Mr. Meehan, no. Mr. Delahunt?  
 [No response.]  
 The CLERK. Mr. Wexler?  
 Mr. WEXLER. No.  
 The CLERK. Mr. Wexler, no. Ms. Baldwin?  
 Ms. BALDWIN. No.  
 The CLERK. Ms. Baldwin, no. Mr. Weiner?  
 Mr. WEINER. No.  
 The CLERK. Mr. Weiner, no. Mr. Schiff?  
 [No response.]  
 The CLERK. Ms. Sánchez?  
 Ms. SÁNCHEZ. No.  
 The CLERK. Ms. Sánchez, no. Mr. Chairman?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their votes? The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters?

Ms. WATERS. No.

The CLERK. Ms. Waters, no.

Chairman SENSENBRENNER. Are there further Members who wish to cast or change their votes? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 18 ayes and 12 noes.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. This is on the bill?

Chairman SENSENBRENNER. Yes.

Mr. WATT. I vote no.

The CLERK. Mr. Watt, no.

Chairman SENSENBRENNER. The clerk will report again.

The CLERK. Mr. Chairman there are 18 ayes and 13 noes.

Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by House rules in which to submit additional, dissenting, supplemental, or minority views.

## DISSENTING VIEWS

H.J. Res. 4, the “Flag Protection Amendment,” proposing an amendment to the U.S. Constitution authorizing Congress to enact legislation prohibiting physical desecration of the flag of the United States, would mark the first time in our nation’s history that the Constitution had ever been amended in order to curtail an existing right. In this instance, the proposed amendment would narrow the scope of the First Amendment’s protection of free expression. This dangerous and unnecessary assault on our fundamental liberties would set a terrible precedent. For the reasons set out below, we respectfully dissent.

As a general matter, Congress has treated the Constitutional amendment process as a remedy of last resort. Although numerous amendments to the Constitution have been proposed, it has been a power used rarely and with great care. Over more than 200 years, our Constitution has been amended only 27 times. If ratified, H.J. Res. 4 would, for the first time in our Nation’s history, modify the Bill of Rights to limit freedom of expression.

This Constitutional amendment is a response to a pair of Supreme Court decisions, *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990), in which the Court held that state and Federal Government efforts to prohibit physical “desecration” of the flag by statute were content-based political speech restrictions and imposed unconstitutional limitations on that speech.<sup>1</sup>

### I. BACKGROUND:

The first flag desecration statutes originated in the States in the late 19th century after supporters failed to obtain Federal legislation prohibiting commercial or political “misuse” of the flag. During the period between 1897 and 1932, flag desecration statutes were enacted in every state. These statutes outlawed use of the flag for a number of purposes, including commercial advertising, marking the flag for political, commercial or other purposes, or publicly mutilating, trampling, defacing or defiling or casting contempt, by words or action, upon the flag.<sup>2</sup>

Congress remained relatively silent on the issue throughout that period, approving the first Federal flag desecration law in 1968<sup>3</sup> in the aftermath of a highly publicized Central Park flag burning incident in protest against the Vietnam War. The 1968 Federal law made it illegal to “knowingly” cast “contempt” upon “any flag of the United States by publicly mutilating, defacing, defiling, burning, or

<sup>1</sup> The proposed amendment reads, in its relevant part, “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” H.J. Res. 4 108th Cong.(2001).

<sup>2</sup> Most of these statutes were eventually struck down as unconstitutional in a series of lower court decisions, usually on the grounds of vagueness.

<sup>3</sup> 18 U.S.C. 700.

trampling upon it.” The law imposed a penalty of up to \$1,000 in fines and/or 1 year in prison.

Shortly after passage of the 1968 law, the Supreme Court considered three notable cases concerning the flag; however, none of these decisions directly addressed the flag burning issue. In *Street v. New York*,<sup>4</sup> the Court ruled that New York could not convict a person for making verbal remarks disparaging the flag. In 1972, the Court ruled in *Smith v. Goguen*,<sup>5</sup> that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants based on a state law making it a crime to publicly treat the U.S. flag with “contempt.” The Court ruled that the law was unconstitutionally vague. In *Spence v. Washington*,<sup>6</sup> the Court overturned a Washington state “improper use” flag law, which, among other things, barred placing any marks or designs upon the flag or displaying such altered flags in public view. These decisions intimated but did not expressly hold that flag burning for political purposes constituted protected activity under the First Amendment.

In 1989, the Supreme Court finally addressed whether a flag burning statute violates the First Amendment in *Texas v. Johnson*.<sup>7</sup> The Court determined that the First Amendment protects those citizens who burn the U.S. flag in political protest from prosecution. In that case, Gregory Johnson was arrested for burning the U.S. flag in violation of Texas’ “Venerated Objects” law<sup>8</sup> during a demonstration outside of the Republican National Convention in Dallas. The Texas statute outlawed “intentionally or knowingly” desecrating a “national flag.” According to the statute, the term “desecrate” was defined to mean “to deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”<sup>9</sup> The Court of Appeals for the Fifth District of Texas upheld Johnson’s conviction.<sup>10</sup> Texas’ highest criminal court, the Court of Criminal Appeals, reversed the lower court decision, holding that the Texas law had been unconstitutionally applied to Johnson in violation of his First Amendment rights.<sup>11</sup>

The Supreme Court affirmed the Texas Court of Criminal Appeals ruling. The Court found that Johnson’s conduct constituted symbolic expression which was both intentional and overtly apparent. The Court determined that, since Johnson’s guilt depended on the communicative aspect of his expressive conduct and was restricted because of the content of the message he conveyed, the Texas statute was “content-based” and subject to “the most exacting scrutiny test” outlined in *Boos v. Barry*, 485 U.S. 312 (1988). Further, the Court stated that, although the Government has an interest in encouraging proper treatment of the flag, it may not criminally punish a person for burning a flag as a means of polit-

<sup>4</sup> 394 U.S. 576 (1969).

<sup>5</sup> 415 U.S. 566 (1974).

<sup>6</sup> 418 U.S. 405 (1974).

<sup>7</sup> 491 U.S. 397 (1989).

<sup>8</sup> Tex. Penal Code Ann. § 42.09(a)(3) (1989).

<sup>9</sup> Tex. Penal Code Ann. § 42.09(b) (1989).

<sup>10</sup> 706 S.W. 2d 120 (1986).

<sup>11</sup> 755 S.W. 2d 92 (1988).



ical protest.<sup>12</sup> The Court determined that the Texas statute was designed to prevent citizens from conveying “harmful” messages, reflecting a government interest that violated the First Amendment principle that government may not prohibit expression of an idea simply because it finds the idea itself offensive or disagreeable.<sup>13</sup>

In response to the *Johnson* ruling, Congress took steps to amend the 1968 statute to make it “content neutral” by passing the “Flag Protection Act of 1989.”<sup>14</sup> The Flag Protection Act of 1989 prohibited flag desecration under all circumstances by removing the statutory requirement that the conduct cast contempt upon the flag. The statute also defined the term “flag” in an effort to avoid any latent First Amendment vagueness problems.<sup>15</sup> Following passage of the Flag Protection Act, a wave of the flag burnings took place in over a dozen cities. The first Bush administration decided to test the Flag Protection Act by bringing criminal charges against protesters who participated in two incidents, one in Seattle and the other in Washington, DC.<sup>16</sup> In both cases, the Federal district courts relied on *Johnson*, striking down the 1989 law as unconstitutional when applied to political protesters.

The Supreme Court accepted jurisdiction of these cases (consolidated as *U.S. v. Eichman*, 496 U.S. 310 (1990)), and, in a 5–4 decision upheld the lower Federal court rulings and struck down the Flag Protection Act of 1989.<sup>17</sup> Again, the Court ruled that the Government’s stated interest in protecting the status of the flag “as a symbol of our Nation and certain national ideals” was related to “the suppression of free expression” that gave rise to an infringement of First Amendment rights. The Court acknowledged that the 1989 law, unlike the Texas statute in *Johnson*, contained no content-based limitations on the scope of protected conduct. However, the Court determined, the Federal statute was subject to strict scrutiny because it could not be enforced without reference to the message of the “speaker.”

<sup>12</sup>The Court ruled that Texas’ proffered interest of preventing breaches of the peace was not implicated and that its interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression.

<sup>13</sup>Certain uses of the flag are misdemeanors under 4 U.S.C. 3, punishable by a fine of not more than \$100 or imprisonment of not more than thirty days or both. Acts criminalized under existing Federal law include: using the flag in “advertising of any nature,” or any person who “shall manufacture, sell expose for sale, or to public view, or give away or use for an purpose, any article or substance being an article of merchandise or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a presentation of any such flag, standard, colors, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed. . . .” Although not enforceable under current precedents, these restrictions would become fully enforceable against businesses, individuals and any Member of Congress using the flag in a campaign ad, should the amendment be ratified. A formal representation of the exact flag is not required. The existing statute includes in the definition of “flag,” “any picture or representation of either, or any part or parts of either, made fo any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag. . . .”

<sup>14</sup>Pub. L. No. 101–131 (1989).

<sup>15</sup>The Flag Protection Act of 1989 defined “flag” as “any flag of the United States, or any part thereof, make of any substance, of any size, in a form that is commonly displayed.” 18 U.S.C. 700.

<sup>16</sup>The Washington, D.C. protest occurred on the steps of the Capitol.

<sup>17</sup>*U.S. v. Eichman*, 496 U.S. 310 (1990) (consolidating No. 89–1433, *U.S. v. Eichman*, 731 F.Supp. 1123 (D.D.C., 1990), and *U.S. v. Haggerty*, 731 F.Supp. (W.D. WA., 1990)).

Since the *Eichman* decision, Congress repeatedly considered and rejected a proposed Constitutional amendment specifying that “the Congress and the states have the power to prohibit the physical desecration of the flag of the United States.”

## II. THE PROPOSED AMENDMENT WOULD ABRIDGE FREE EXPRESSION:

Proponents of the amendment argue that desecration of the flag should not be considered speech within the meaning of First Amendment. Yet it is precisely the expressive content of acts involving the flag that the amendment would target. Indeed, it appears that proponents of the amendment sometimes wish to have it both ways. For example, an amendment offered by Rep. Scott replacing the word “desecration” with the word “burning” was rejected precisely because it would have prohibited the destruction of a flag in a purely content neutral manner<sup>18</sup>. As Chairman Chabot observed, “A debate and discussion as to what forms of desecration should be outlawed, such as ‘burning’ will come at a later date in Congress. Therefore, this amendment should be rejected as unduly limiting the object and purpose of the Flag Protection Amendment, which is to protect the flag from any acts of physical defilement or defacement, or as is described in this, desecration.”<sup>19</sup>

That the criminal sanctions against flag burning in the *Johnson* case, and the ones the sponsors of this amendment would presumably seek to enact upon its adoption, are directly related to the expressive content of the act are clear. Current law prescribes that “[t]he flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.”<sup>20</sup> It is clear then, that prohibitions against flag burning or “physical desecration” are fundamentally content-based. Burning a flag to demonstrate respect or patriotism is prescribed by current law. Should the proposed amendment pass, burning the flag to convey a political viewpoint of dissent or anger at the United States would become a crime.

The Framers of the Constitution saw dissent and its protection as an affirmative social good.<sup>21</sup> Limits on the manner or form of dissent must inevitably translate into limits on the content of the dissent itself. Limitations on the use of the flag in political demonstrations ultimately undermines the freedoms the flag represents.

There can be no doubt that “symbolic speech” relating to the flag falls squarely within

the ambit of traditionally protected speech. Our nation was borne in the dramatic symbolic speech of the Boston Tea Party, and our

<sup>18</sup>The term “desecration” itself is highly revealing. Webster’s New World Dictionary defines “desecrate” as “to violate the sacredness of,” and in turn defines “sacred” as “consecrated to a god or God; holy; or having to do with religion.” Proponents of the amendment use similar language in defending the proposal.

<sup>19</sup>H.Rpt. 107–\_\_\_\_\_, at \_\_\_\_ (2003)(statement of Rep. Chabot).

<sup>20</sup>4 U.S.C. 8(k).

<sup>21</sup> “[T]hose who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability.” Kent Greenwalt, *Speech and Crime*, Am. B. Found. Res. J. 645, 672–3 (1980).

courts have long recognized that expressive speech associated with the flag is protected speech under the First Amendment.

Beginning in 1931 with *Stromberg v. California*<sup>22</sup> and continuing through the mid-1970's with *Smith v. Goguen*<sup>23</sup> and *Spence v. Washington*,<sup>24</sup> the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted 'symbolic speech' subject to protection under the First Amendment.<sup>25</sup> Those who seek to justify H.J. Res. 4 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood law.<sup>26</sup>

While we deplore the burning of an American flag in hatred, we recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one Federal court wrote in a 1974 flag burning case, "[T]he flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."<sup>27</sup>

The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 4 will also open the door to selective prosecution based purely on political beliefs. When John Peter Zenger was charged with 'seditious libel' in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.<sup>28</sup>

The history of the prosecution of flag desecration in this country bears out these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration have been al-

<sup>22</sup> 283 U.S. 359 (1931) (State statute prohibiting the display of a 'red flag' overturned). Absent this decision, a State could theoretically have prevented its citizens from displaying the U.S. flag.

<sup>23</sup> 415 U.S. 94 (1972).

<sup>24</sup> 418 U.S. 405 (1974) (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag).

<sup>25</sup> *Texas v. Johnson*, 491 U.S. at 397.

<sup>26</sup> See also, Note, *The Supreme Court—Leading Cases*, 103 Harv. L. Rev. 137, 152 (1989) ('the majority opinion [in *Johnson*] is a relatively straightforward application of traditional first amendment jurisprudence'); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 Ind. L.J. 511, 547 (1991) ('*Johnson* is an easy case if well-established first amendment principles are applied to it'). Survey results show that the majority of Americans who initially indicate support for a flag protection amendment oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment, but when asked if they would oppose or favor such an amendment if they knew it would be the first in our Nation's history to restrict freedom of speech and freedom of political protest, support plummeted from 64 percent to 38 percent.

<sup>27</sup> *U.S. ex rel Radich v. Criminal Court of N.Y.*, 385 F. Supp. 165, 184 (1974).

<sup>28</sup> PHILADELPHIA GAZETTE, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

most completely ignored. An article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were “invariably critics of national policy, while ‘patriots’ who tamper with the flag are overlooked.”<sup>29</sup> Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was “more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment.”<sup>30</sup>

Almost as significant as the damage H.J. Res. 4 would do to our own Constitution, is the harm it will inflict on our international standing in the area of human rights. Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country’s laws, yet freedom-loving.

Americans justifiably applauded these brave actions. If we are to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes.<sup>31</sup>

To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to “discredit” a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States Flag desecration statute.<sup>32</sup> By adopting H.J. Res 4 we will be unwittingly encouraging other countries to enact and enforce other more restrictive limitations on speech while impairing our own standing to protest such actions.

### III. AMENDING THE CONSTITUTION TO LIMIT THE BILL OF RIGHTS SETS A DANGEROUS PRECEDENT:

Adoption of H.J. Res. 4 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the First Amendment and diminish respect for our Constitution. Doing so would make it unlikely to be that this would be the last time Congress acts to restrict our First Amendment liberties. As President Reagan’s Solicitor General Charles Fried testified in 1990:

Principles are not things you can safely violate “just this once.” Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a

<sup>29</sup>See Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 *Flag Bull.* 65, 154 (1995).

<sup>30</sup>*Id.*

<sup>31</sup>See, *See Hearing on H.J. Res. 54, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2nd Sess. (April 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of PEN American Center, Feb. 5, 1997) (“To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world.”).

<sup>32</sup>Rotunda, *Treatise on Constitutional Law: Substance and Procedure* §20.49 at 352 (2d ed. 1992).

principle is; just as the man who says that only this once let's make  $2 + 2 = 5$  does not know what it is to count.<sup>33</sup>

Amending the Constitution, particularly concerning issues which inflame public passion, represents a clear and present danger to our core liberties.<sup>34</sup> Conservative legal scholar Bruce Fein emphasized this concern when he testified before the Subcommittee at 1995 House Judiciary hearings:

While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.<sup>35</sup>

Professor Norman Dorsen points out in his testimony, "not including the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it, and very few of these reversed constitutional decisions of the Supreme Court. To depart from this tradition now . . . would be an extraordinary act that could lead to unpredictable mischief in coming years."<sup>36</sup>

#### IV. FLAG BURNING RARELY OCCURS:

H.J. Res. 4 responds to a perceived problem—flag burning—that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas v. Johnson*<sup>37</sup> decision in 1989 there were only 45 reported incidents of flag burning.<sup>38</sup> Experience with prior efforts to criminalize flag desecration indicates that imposing such penalties have actually instigated flag burning.<sup>39</sup>

<sup>33</sup> *Measures to Protect the American Flag, 1990: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. (June 21, 1990) (statement of Charles Fried at 113).

<sup>34</sup> Legal philosopher Lon Fuller also highlighted this very problem over four decades ago: "We should resist the temptation to clutter up [the Constitution with amendments relating to substantive matters. In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger of the weakening effect [such amendments] have on the moral force of the Constitution itself." L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J.L. Ed. 457, 465 (1954), as cited in *Proposed Flag Desecration Amendment 1995: Hearing Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary*, 104th Cong. (June 6, 1995) [hereinafter, 1995 Senate Judiciary Hearings] (statement of Gene R. Nichol).

<sup>35</sup> See *Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States, 1995: Hearing on H.J. Res. 79, Before the Subcomm. on Constitution of the House Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter, 1995 House Judiciary Hearings] (statement of Bruce Fein, at 1).

<sup>36</sup> See *1997 House Judiciary Hearings*, *supra* n. 31 (statement of Professor Norman Dorsen, New York University School of Law).

<sup>37</sup> 491 U.S. 397 (1989). In a 5–4 decision authored by Justice Brennan, the Court found that the Texas flag desecration law was unconstitutional as applied in that it was a "content-based" restriction. Subsequent to *Johnson*, Congress enacted the Flag Protection Act in an effort to craft a more content-neutral law. In *United States v. Eichman*, 496 U.S. 310 (1990), the Court overturned several flag burning convictions brought under the new law, finding that the Federal law continued to be principally aimed at limiting symbolic speech.

<sup>38</sup> Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 Flag Bull. 65 (1995).

<sup>39</sup> In his extensive survey of the history of American flag desecration law, Robert Goldstein writes that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968]

In addition to the relative infrequency of flag burning, proponents of the measure cast the current state of the law as though Congress is impotent to protect the flag. However, even witnesses who disagree with the Supreme Court rulings in *Johnson* and *Eichman* have stated that the impact of those cases was not so broad. In 1995, Bruce Fein stated as much in subcommittee hearings. "Flag desecrations when employed as "fighting words" or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky v. New Hampshire* and *Brandenburg v. Ohio*." <sup>40</sup>

#### V. THIS AMENDMENT IS THE WRONG WAY TO HONOR OUR VETERANS:

It is a mistake to argue that this amendment honors the courage and sacrifice of our veterans. While we condemn those who would dishonor our nation's flag, we believe that rather than protecting the flag, H.J. Res. 4 will merely serve to dishonor the Constitution and to betray the very ideals for which so many veterans fought, and for which so many members of our armed forces made the ultimate sacrifice. General Colin L. Powell echoed this sentiment:

The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.<sup>41</sup>

Jim Warner, a Vietnam veteran and prisoner of the North Vietnamese from October 1967 to March 1973, has written:

The fact is, the principles for which we fought, for which our comrades died, are advancing everywhere upon the Earth, while the principles against which we fought are everywhere discredited and rejected. The flag burners have lost, and their defeat is the most fitting and thorough rebuke of their principles which the human could devise. Why do we need to do more? An act intended merely as an insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard. . . . Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.<sup>42</sup>

was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." Robert J. Goldstein, *Saving 'Old Glory': The History of the American Flag Desecration Controversy* 215 (1995).

<sup>40</sup> 1995 *House Judiciary Hearings*, *supra* n. 35 (statement of Bruce Fein at 1-2).

<sup>41</sup> Letter from General Colin L. Powell to Hon. Patrick Leahy, May 18, 1999.

<sup>42</sup> See 1997 *House Judiciary Hearings*, *supra* n. 31 (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran who was held hostage in Lebanon, who wrote that "[H.J. Res. 54] is an extremely unwise restriction of every American's Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously

There are many ways Congress can honor veterans. First and foremost, we can insure that programs designed to protect them and provide them with much needed assistance are properly funded. Yet the conference agreement on the 2004 Budget Resolution, recently adopted, short-changes our veterans in vital areas such as health care.

The conference agreement increases funding for appropriated veterans programs for 2004 by \$2.6 billion above the amount needed to maintain purchasing power at the 2003 level, but cuts appropriations for veterans health care by a total of \$6.2 billion below that level over 10 years. The conference agreement does not include the reconciliation instructions to reduce spending for mandatory veterans benefits by \$14.6 billion over 10 years that were contained in the House Republican budget. The House rejected these cuts in the motion to instruct conferees offered by Rep. Spratt, which was adopted by a vote of 399–22 on April 1, 2003. Ultimately, the conference agreement provides \$22.1 billion more in budget authority for veterans programs than the House Republican budget.

The 10-year cut to appropriated veterans programs is likely to be even worse than it appears, and the apparent \$2.6 billion increase for veterans programs for 2004 is likely to be smaller than it at first appears, because the Republican conference agreement includes an additional 10-year unspecified cut of \$128 billion, with \$7.6 billion in additional unspecified cuts for 2004 alone. The Appropriations Committee may apply some or all of this additional cut to discretionary veterans programs.

The conference agreement assumes the implementation of proposals included in the President's budget to impose a \$250 enrollment fee on priority level 7 and 8 veterans who wish to maintain their eligibility to use the veterans medical care system, and to increase co-payments for primary care visits and prescription drugs for priority level 7 and 8 veterans.

#### VI. CONCLUSION:

Adoption of H.J. Res. 4 will undermine our commitment to freedom of expression and do real damage to the constitutional system set up by our forefathers. If we amend the Constitution to outlaw flag desecration, we will be joining ranks with countries such as China and Iran and the regimes of the former Soviet Union and South Africa.<sup>43</sup>

We believe we have come too far as a nation to risk jeopardizing our commitment to freedom in such a fruitless endeavor to legislate patriotism. As the Court wrote in *West Virginia State Board of Education v. Barnette*:

[The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian

an act of political speech that I'm amazed anyone could disagree with the Court." (*Id.* statement of Terry Anderson).

<sup>43</sup>Roman Rolinick, "Flag Amendment would put U.S. with Iran, China," UPI (July 1, 1989).

enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>44</sup>

If we adopt H.J. Res. 4, we will be denigrating the vision of Madison and Jefferson. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will not go on record as supporting a proposal which will do what no foreign power and no flag burner has been able to do—limit the freedom of expression of the American people.

JOHN CONYERS, JR.  
HOWARD L. BERMAN.  
RICK BOUCHER.  
JERROLD NADLER.  
ROBERT C. SCOTT.  
MELVIN L. WATT.  
ZOE LOFGREN.  
SHEILA JACKSON LEE.  
MAXINE WATERS.  
TAMMY BALDWIN.  
LINDA T. SÁNCHEZ.




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<sup>44</sup> 319 U.S. at 641.